W. B. Dwight

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 570.

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, INTERVENORS, APPELLANTS,

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA ET AL.

PPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 22, 1877.



SUPREME COURT OF THE UNITED STATES.

No. 570.

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, INTERVENORS, APPELLANTS,

vs.

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1, 2, 3 Pleas in the circuit court of the United States for the district of Iowa, at an adjourned term thereof, begun and holden at the United States court room, at Des Moines, in said district, on Wednesday, August 29, 1877, the same being after the May term, 1877, of said court, before the Hon. John F. Dillon, judge of the eighth circuit, and Hon. James M. Love, judge of the district court for the district of Iowa.

4 Be it remembered that heretofore, to wit, on the 8th day of June, 1877, there appears in the records of the proceeeings of the circuit court of the United States for the district of Iowa, in a certain cause wherein the Farmers' Loan & Trust Company, trustee, is plaintiff, and the Central Railroad of Iowa and others are defendants, the following entry, to wit:

5 In U. S. circuit court, district of Iowa.

FARMERS' LOAN & TRUST CO.
vs.
THE CENTRAL RAILROAD CO. OF IOWA ET AL. } No. 501. Eq.

The decree in this case having ordered notice of the sale therein ordered to be published inter alia in the Financier newspaper of New York, & it appearing that the said Financier has been merged in or its name changed to that of The Public, it is now here, January 8, 1877, ordered that the said notice may be inserted in the said newspaper called The Public with the same effect as if the name of the paper had not been changed.

The clerk will enter this order on the first day of the adjourned term.

(S'g'd) JOHN F. DILLON,
Judge.

6 Afterwards, to wit, on the 27th day of July, 1877, Lewis M. Fisher, master, filed in said clerk's office, on said cause, his report of the sale of road, which said report is in the words and figures following, to wit:

7 In the United States circuit court for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA et al.

To the honorable judges of the United States circuit court for the district of Iowa:

The undersigned the special master appointed by this court in said cause by the decree thereof entered on the 22 day of October, A. D. 1875, begs leave to report:

That the said Central Railroad Company of Iowa, the second and third mortgage bondholders of said company, and the judgment creditors of said company, all and each one of them, wholly failed to
8 pay within ten days from the date of said decree the sum of $4,623,334.99, with seven per cent. interest thereon, all in gold, or any part thereof, as therein required. And that in pursuance of said decree and upon the written request of the complainant in said cause, dated June 2nd, A. D. 1877, I forthwith proceeded to and did give four weeks' notice of the sale of the Central Railroad of Iowa by publishing

notices of the same once each week for four successive weeks prior to the date appointed for the sale, viz, the 18th day of July, 1877, in the following newspapers: The Public, published in The city of New York; The Iowa State Register, published at Des Moines, Iowa, and the Marshall County Times, published at Marshalltown, Iowa.

Copies of said notices, together with proofs of their publication
9 in the several newspaper' above named as aforesaid, are hereto attached, marked "Exhibit A."

That the publication of said notice required by said decree in The Financier by the order of this court, dated January 8, 1877, was changed to The Public, of New York City.

That on the 18th day of July, 1877, at 2 o'clock p. m. on said day, at the front door of the county court house in the city of Marshalltown, Iowa, I offered for sale, as provided by said decree, the property in said notices described, and then and there sold the same to the Farmers' Loan and Trust Company of the city of New York, in trust for the bondholders of the Central Railroad Company of Iowa, for the sum of five million one hundred and ninety-two thousand three hundred and ninety ($5,192,390) dollars.

That the said amount was bid by the said Farmers' Loan and Trust Company in writing and was the highest and only bid made at
10 said sale, being the amount of the principal and interest due at said date on the first-mortgage bonds of the Central Railroad Company of Iowa. Said bill is hereto attached and made part of this report, marked "Exhibit B."

A conveyance of the property so sold as aforesaid is herewith presented to the court for its approval.

My account for compensation and expenses as special master under said decree is hereto attached, marked "Exhibit C," amounting to the sum of $637.50, all of which is due and unpaid, and the same is is hereby presented for allowence.

All of which is herewith respectfully submitted to your honors.

(S'g'd) LEWIS M. FISHER,
Special Master.

11 [The Marshall Daily and Weekly Times. Railroad, commercial, book, and job printers, and binders, Times building, No. 18 First avenue.]

MARS'AL'TOWN, IOWA, *July* 17, 1877.

Mr. Lewis M. Fisher to Chapin & Sower, Dr.

To pub. sale of C. R. R. of Iowa $20 00

12 (Page 161.)

Central Railroad Company of Iowa to the Financier Association, Dr.

[New York. Office 71 Broadway. P. O. box 1319.]

For advertising the public foreclosure sale ..... 80c.
June 14, 21, 28, & July 5, 1877, 80.
Paid 187 .

Prior to the year 1876 this journal bore the name of The Financier.

For the Financier Association.

(Across the face:) Original.

13 [R. P. Clarkson, J. S. Clarkson, Register office, corner Fourth and Court avenue.]

(Ledger C, folio 280.)

DES MOINES, *July* 16, 1877.

Mr. L. M. Fisher, Clinton, to The Iowa State Register, Dr.

Nov. 11, 1875, to adv. master sale:
Farmers L. & T. Co. vs. Central R. R. Co., 7½ sqr., d., 1 t.... $7 50

Ordered out by telegraph after one insertion.

14 [R. P. Clarkson, J. S. Clarkson, Register office, corner Fourth & Court avenue.]

(Ledger C, folio 280.)

DES MOINES, *July* 16, 1877.

Mr. L. M. Fisher, Clinton, to The Iowa State Register, Dr.

June 10, 1877, to adv. master sale C. R. R. Co., 6½ sqr., d., 4 t.. 15 30
2 Sundays & 2 Tuesdays.

15 EXHIBIT A.

STATE OF IOWA,
Marshall County, ss:

I, Geo. Sower, on oath, do depose and say that I am publisher of The Marshall County Times, a weekly newspaper printed at Marshalltown, in Marshall County, Iowa; that the annexed printed notice in the above-entitled action was published in said newspaper four consecutive weeks, and that the last of said publication was on the 11th day of July, 1877.

(S'g'd) GEO. SOWER.

Subscribed and sworn to before me, and in my presence, by the said Geo. Sower, this 16 day of July, A. D. 1877, as witness my hand and seal.

[SEAL.] (S'g'd) J. M. PARKER,
Notary Public for Marshall Co., Iowa.

16 *Master's sale under decree of foreclosure in the matter of the Central Railroad Company of Iowa.*

In the circuit court of the United States for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY }
vs.
THE CENTRAL RAILROAD COMPANY ET AL. }

Public notice is hereby given that, in pursuance of the decree entered in the circuit court of the United States for the district of Iowa, in the above-entitled cause, on the 22d day of October, A. D. 1875, I, Lewis M. Fisher, special master in said cause, will, on Wednesday, the 18th day of July, A. D. 1877, at 2 o'clock p. m. on said day, at the front door of the county court house, in the city of Marshalltown, Iowa, sell at public auction to the highest and best bidder, all the property of the Central Railroad Company of Iowa included in the first mortgage thereof, and described therein as follows, to wit:

17 The entire corporate property of the said Central Railroad Company of Iowa, and all its franchises and privileges, constructed, or to be hereafter constructed, now held and acquired, or to be hereafter constructed and acquired, extending from a point in Davis County, on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa, in Marhaska County, a distance of about sixty miles along the line formerly owned by said Iowa Central Railroad Company, and thence northerly to Marshalltown, and thence along and including the railroad built by the Iowa River Railway Company to Ackley, in Hardin County, and thence northerly to the north line of said State of Iowa, at such point as shall be hereafter definitely determined, including all the rights and franchises of the said Iowa Central Railroad Company, and of said Iowa River Railway Company, including also along the entire line all the right of way acquired by
18 purchase or condemnation, road-bed, finished and in process of construction, with all material collected for construction or operative purposes, depot-grounds, gravel-pits, quarries, and real estate, station-houses, water-tanks, repair and machine shops, turn-tables, coal-houses, and sheds, and all things of every name and nature belonging to the said party of the first part (The Central Railroad Company of Iowa), and pertaining to said Central Railroad; also all machinery, locomotives, and rolling-stock, and all tools and supplies heretofore acquired or which may be acquired by said Central Railroad Company of Iowa.

Dated June 6th, 1877.

LEWIS M. FISHER,
Special Master.

19 EXHIBIT A.

Affidavit of publication.

STATE OF IOWA,
Polk County, ss:

R. P. Clarkson, being sworn, says that he is publisher of the Iowa State Register, a newspaper published in Des Moines, Polk County, Iowa, and that the notice, of which the annexed is a printed copy, was published in said Iowa State Register for four consecutive weeks, the first publication being on the 10th day of June, 1877, and the last on the 3d day of July, 1877.

(S'g'd) R. P. CLARKSON.

Subscribed and sworn to by the said R. P. Clarkson before me this 24th day of July, 1877.

(S'g'd) W. W. PIERCE,
Notary Public.

20 *Master sale under decree of foreclosure in the matter of the Central Railroad Company of Iowa.*

In the circuit court of the United States for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA
et al.

Public notice is hereby given that in pursuance of the decree entered in the circuit court of the United States for the district of Iowa in the above-entitled cause on the 22d day of October, A. D. 1875, I, Lewis M.

Fisher, special master in said cause, will, on Wednesday, the 18th day of July, A. D. 1877, at 2 o'clock p. m. on said day, at the front
21 door of the county court-house in the city of Marshalltown, Iowa, sell at public auction to the highest and best bidder all the property of the Central Railroad Company of Iowa, included in the first mortgage thereof and described therein as follows, to wit:

The entire corporate property of the said Central Railroad Company of Iowa, and all its franchises and privileges, constructed or to be hereafter constructed, now held and acquired or to be hereafter constructed and acquired, extending from a point in Davis County on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa, in Mahaska County, a distance of about sixty miles along the line form'rly owned by said Iowa Central Railroad Company, and thence northerly to Marshalltown, and thence along and including the railroad built by the said Iowa River Railway Company to Ackley, in Hardin County, and thence northerly to the north
22 line of said State of Iowa at such point as shall be hereafter definitely determined, including all the rights and franchises of the said Iowa Central Railroad Company and of the said Iowa River Railway Company, including also along the entire line all the right of way acquired by purchase or condemnation, road-bed finished and in process of construction, with all material calculated for construction or operative purposes, depot-grounds, gravel-pits, quarries, and real estate, station-houses, water tanks, repair and machine shops, turn-tables, coal-houses, and sheds, and all things of every name and nature belonging to said party of the first part (The Central Railroad Company of Iowa), and pertaining to said Central Railroad; also all machinery, locomotives, and rolling-stock, and all tools and supplies heretofore acquired or which may hereafter be acquired by said Central Railroad Company of Iowa.
23 Dated June 6th, 1877.

LEWIS M. FISHER,
Special Master.

24 EXHIBIT A.

Master's sale under decree of foreclosure in the matter of the Central Railroad Company of Iowa.

In the circuit court of the United States for the district of Iowa.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE CENTRAL RAILROAD COMPANY OF Iowa et al.

Public notice is hereby given that in pursuance of the decree entered in the circuit court of the United States for the district of Iowa in the above entitled cause on the 22d day of October, A. D. 1875, I, Lewis M. Fisher, special master in said cause, will, on Wednesday, the 18th day of July, A. D. 1877, at two o'clock, p. m. on said day, at the front door of the county court house in the city of Marshalltown, Iowa, sell at public auction to the highest and best bidder all the property of
25 the Central Railroad Company of Iowa included in the first mortgage thereof, and described therein as follows, to wit:

The entire corporative property of the said Central Railroad Company of Iowa, and all its franchises and privileges, constructed or to be hereafter constructed, now held and acquired or to be hereafter con-

structed and acquired, extending from a point in Davis County on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa in Mahaska County, a distance of about sixty miles along the line formerly owned by said Iowa Central Railroad Company, and thence northerly to Marshalltown, and thence along and including the railroad built by the said Iowa River Railway Company to Ackley in Hardin County, and thence northerly to the north line of said State of Iowa, at such point as shall be hereafter definitely determined, including all the rights and franchises
26 of the said Iowa Central Railroad Company, and of the said Iowa River Railway Company, including also along the entire line all the right of way acquired by purchase or condemnation, road bed finished and in process of construction, with all material collected for construction or operative purposes, depot grounds, gravel pits, quarries, and real estate, station houses, water tanks, repair and machine shops, turn tables, coal houses, and sheds, and all things of every name and nature belonging to said party of the first part (The Central Railroad Company of Iowa) and pertaining to said Central Railroad; also all machinery, locomotives, and rolling stock, and all tools and supplies heretofore acquired or which may hereafter be acquired by said Central Railroad Company of Iowa.

Dated June 6th, 1877.

LEWIS M. FISHER,
Special Master.

27 SOUTHERN DISTRICT OF NEW YORK, *ss:*

A. S. Hale, being duly sworn, depose and says, that he is the business manager of "The Public," a paper published weekly in the city of New York, and that deponent has personal knowledge that the above notice appeared in said paper "The Public," for four successive weeks, commencing on the 14 day of June, A. D. 1877.

(S'g'd) A. S. HALE.

Subscribed and sworn to before me this 7th day of July, A. D. 1877.

[SEAL.] (S'g'd) J. M. DEUEL,
U. S. Comis. S. D. of N. Y.

28 [James Grant, attorney at law, Davenport, Iowa.]

DAVENPORT, 187,
July 18, 1877.

In trust, according to the terms of the decree filed October 22, 1875, the Farmers' Loan and Trust Company bid for the Central Railroad of Iowa and appurtenances, as described in the first mortgage, the sum of five million one hundred and ninety-two thousand three hundred and ninety and $\frac{00}{100}$ dollars ($5,192,390$\frac{00}{100}$), being the amount of the first mortgage bonds of said road with 7% interest to date.

(S'g'd) THE FARMERS' LOAN AND TRUST COMPANY, *Trustee,*
By JAMES GRANT, *its Att'y.*

29 EXHIBIT A.

The Central Railroad of Iowa, in account with L. M. Fisher, special master, D'r.

To	Doll. c'ts.
Nov., 1875, telegram to Public	1 50
Nov., 1875, telegram to Des Moines Register	75
March 5, 1877, express on paper to clerk	75
" " " " Judge Lore	25

June 6th, expenses to Davenport	4 50
June 15, telegram to State Register	70
June 16, " " " "	50
June 18, expenses to Marshalltown	5 00
Postage	75
Advertising sale, The Public	80 00
" " Marshalltown Times	20 00
" " Des Moines Register	22 80
Fee for sale	500 00
Total amount due master	$637 50

30 (Endorsed:) 501. In United States circuit court for the district of Iowa. The Farmers' Loan and Trust Company vs. The Central Railroad Company of Iowa. Master's report of sale of Central Railroad of Iowa. Filed July 27, 1877. E. R. Mason, clerk.

31 Afterwards, to wit, on the 10th day of August, 1877, Lewis M. Fisher, master, filed in said clerk's office, in said cause, proof of publication of Iowa State Register, which said proof of publication is in the words and figures following, to wit:

32 *Affidavit of publication.*

STATE OF IOWA,
Polk County, ss:

R. P. Clarkson, being sworn, says that he is one of the publishers of The Iowa State Register, a newspaper published in Des Moines, Polk County, Iowa, and that the notice, of which the annexed is a printed copy, was published in said Iowa State Register for four consecutive weeks, the first publication being on the 19th day of June, 1877, and the last on the 10th day of July, 1877.

R. P. CLARKSON.

Subscribed and sworn to by the said R. P. Clarkson before me this 28th day of July, 1877.

[SEAL.] W. W. PIERCE,
Notary Public.

33 *Master's sale under decree of foreclosure in the matter of the Central Railroad Company of Iowa.*

In the circuit court of the United States for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA
et al.

Public notice is hereby given that in pursuance of the decree entered in the circuit court of the United States for the district of Iowa in the above-entitled cause, on the 22d day of October, A. D. 1875, I, Lewis M. Fisher, special master in said cause, will, on Wednesday, the 18th day of July, A. D. 1877, at 2 o'clock p. m., on said day, at the front door of the county court-house in the city of Marshalltown, Iowa, sell at public auction, to the highest and best bidder, all the property
34 of the Central Railroad Company of Iowa included in the first mortgage thereof, and described therein as follows, to wit:

The entire corporate property of the said Central Railroad Company

of Iowa, and all its franchises and privileges, constructed or to be hereafter constructed, now held and acquired, or to be hereafter constructed and acquired, extending from a point in Davis County, on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa, in Mahaska County, a distance of about sixty miles along the line formerly owned by said Iowa Central Railroad Company, and thence northerly to Marshalltown, and thence along and including the railroad built by the said Iowa River Railway Company to Ackley, in Hardin County, and thence northerly to the
35 north line of said State of Iowa, at such point as shall be hereafter definitely determined, including all the rights and franchises of the said Iowa Central Railroad Company, and of the said Iowa River Railway Company, including, also, along the entire line, all the right of way acquired by purchase or condemnation, road bed finished and in process of construction, with all material collected for construction or operative purposes, depot grounds, gravel pits, quarries, and real estate, station-houses, water-tanks, repair and machine shops, turn-tables, coal-houses, and sheds, and all things of every name and nature belonging to said party of the first part (The Central Railroad Company of Iowa) and pertaining to said Central Railroad; also all machinery, locomotives and rolling stock, and all tools and supplies heretofore
36 acquired or which may hereafter be acquired by said Central Railroad Company of Iowa.

Dated June 6th, 1877.

LEWIS M. FISHER,
Special Master.

jn10d4tues

(Endorsed:) No. 501. Eq. Farmers' Loan & Trust Co. vs. Central R. R. of Iowa et al. Proof of publication of Iowa State Register. Filed Aug. 10, 1877. E. R. Mason, clerk.

37 Afterwards, to wit, on the 25th day of August, 1877, N. A. Cowdrey et al. filed in said clerk's office in said cause their exceptions to the master's report of the sale of mortgaged premises, which said exceptions is in the words and figures following, to wit:

38 *Exceptions of N. A. Cowdrey and others, intervenors, to the master's report of the sale of mortgaged premises.*

Circuit court of the United States, district of Iowa. May term, 1877.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE CENTRAL RAILROAD OF IOWA ET AL.

Now comes N. A. Cowdrey and on his own behalf and in behalf of all others allowed to intervene in this case with him, and on behalf of all the 1st mortgage bondholders described in the complaint and decree in this cause who choose to come in and contribute to the expense hereof, and excepts to the report of the special master in this case, filed July 27th, 1877, relating to the sale of the mortgaged premises.

1st. For that the decree and order of this court required the
39 sale of the premises to be advertised in a newspaper printed in the city of New York, called "The Financier"; that said master

did not advertise said sale in said newspaper, and did not report his inability to find any such newspaper to the court as he was bound to do; that the special master did not comply with the order of the court in this report otherwise than by advertising said sale in a newspaper called "The Public," published by the Financier Association.

2d. For that the bid made for said premises by said complainant, The Farmers' Loan & Trust Company, is, and was an unauthorized bid, without authority from the deed of trust which was being foreclosed, or from the cestui que trust, or from any other authorized party whatever; that no money has been paid in upon said bid, or is expected to be
40 paid by the bidder; that the cestui que trust cannot be compelled to go into a new speculation of running and operating a railroad without their express written assent previously obtained; that said master should have refused to receive the bid so made, and again offerred the property for sale, or reported the facts to the court. On all of which he and they respectfully prays the judgment of this honorable court.

Aug. 21st, 1877.

(S'g'd) N. A. COWDREY.

(Endorsed:) No. 501. Eq. U. S. circuit c't district of Iowa. Farmers' Loan & Trust Co. vs. Central Railroad of Iowa et al. Exceptions of N. A. Cowdrey and others, to master's report of sale of mortgaged premises. Filed Aug. 25, 1877. E. R. Mason, clerk.

41 Afterwards, to wit, on the 28th day of August, 1877, Ezra. H. Linley filed in said clerk's office, in said cause, his protest against the terms on which they ask for the transfer of the road, which said protest is in the words and figures following, to wit:

42 [Ezra H. Linley, dealer in railway supplies, &c., 714 N. Second street. Sole Western agent for William Jessop & Sons, limited steel manufacturers, Sheffield, Eng.; W'm Greaves & Son's English files; Krupp's tires and spring-steel; Ecton Mills Turkish emery; Wilson Bohannan's car & switch locks.]

ST. LOUIS, MO., *May 27th*, 1877.

To the clerk of the U. S. circuit court, Des Moines, Iowa.

DEAR SIR:- In reply to the circular of the committee v. Central Railroad of Iowa, I hereby protest against the terms on which they ask for the transfer of the road, viz, 18 months with 8 % interest.

I did sign an agreement for 15 months, with 10 % interest, which I now withdraw.

Yours, &c.,

E. H. LINLEY.

43 (Endorsed:) United States circuit court, district of Iowa. No. 501. Eq. Farmers' Loan & Trust Co., trustee, vs. the Central R R. of Iowa. Protest of Ezra H. Linley vs. the approval of sale. Filed Aug. 28, 1877. E. R. Mason, clerk.

44 Afterwards, to wit, on the 29th day of August, 1877, Turner & Grant, for the trustees, filed in said clerk's office, in said cause, a motion to confirm the sale of the road, which said motion is in the words and figures following, to wit:

45 Circuit court of the United States, for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY
v.
THE IOWA CENTRAL RAILROAD COMPANY
and others.

Now come the plaintiffs and show to the court the report of the master on the sale of the said Iowa Central Railroad and property, under the decree of this court, and the said plaintiffs move the court to confirm the said sale and to approve the deed to the said trustee, filed with the report of the master.

(S'g'd) TURNER AND GRANT,
For the Trustees.

(Endorsed:) U. S. C. C., dis. Iowa. The Farmers' Loan and Trust Company *v.* The Iowa Central R. R. Co. Motion by trustee to confirm sale. Filed Aug. 29, '77. E. R. Mason, clerk.

46 On the same day, to wit, on the 29th day of August, 1877, Turner and Grant, for the complainants, filed in said clerk's office, in said cause, the report of trustee, which said report is in the words and figures following, to wit:

47 In the circuit court of the United States for the District of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY
ag'st
THE CENTRAL RAILROAD COMPANY OF IOWA
& others.

To the judges of the circuit court of the United States for the District of Iowa:

The complainant, the Farmers' Loan and Trust Company, makes this, its report, to the court as follows:

I. That immediately on being informed of the opinion of the court delivered in this cause at the May term of the court, the complainant in exercise of the powers conferred by the deeds of trust and by the decree of the court herein, caused the property covered by the deeds of trust of the Central Railroad Company, of Iowa to be duly advertised as in the said decree, and in a subsequent order of the court, bearing date the eighth day of January, 1877, provided, and to be sold by Lewis M. Fisher, esquire, the master in the decree named, according to
48 law and the practice of this court.

II. That the said sale was duly made at the front door of the court house, in the city of Marshalltown, Iowa, on the 18th day of July, 1877; and that the complainant in pursuance of the terms and directions in the said decree contained, became the purchaser, bidding the principal and interest of the first mortgage bonds, to wit: the sum of five million one hundred and ninety-two thousand, three hundred and ninety dollars, ($5,192,390,) as will appear by reference to the said master's report of sale, now on file, with a deed of conveyance by the said master to the complainant.

III. There have been presented to the complainant, and we herewith submit to the court, articles of association of "The Central Iowa Railway Company," by Richard L. Ashhurst and others, claiming to represent $2,425,500 of first mortgage bonds.

IV. There have also been presented to the complainant, and we herewith submit to the court, articles of association of "The Iowa
49 Central Railway Company," by Russell Sage and others, claiming to be first mortgage bond holders, and cestui que trusts of the complainants.

V. There have also been presented to the complainant, and we herewith submit to the court, articles of association of "The St. Louis, Iowa and Minnesota Railroad Company," by J. H. Cusack and others, claiming to represent bondholders to the amount of $700,000—first mortgage bonds.

VI. In consequence of the presentation to the complainant of the above-mentioned articles of association, the complainant has not prepared itself any articles of association, being willing and ready to adopt any one of them as the court may direct; and it therefore now submits to the court whether it shall convey the mortgaged premises to any one of the above-named corporations; and if so, to which one of them, or shall proceed to organize a new company according to the terms of the trust-deeds, on being properly requested by a majority of the
50 first mortgage bond holders. The complainant has no evidence that the persons presenting any one of these articles represent a majority of the first mortgage bond holders and only one of them claims to do so.

VII. In consequence of the increased and unusual duties which have been imposed upon the trustee, the complainant, and its counsel in this cause, the complainant asks to be allowed the sum of thirty thousand dollars ($30,000) in addition to court costs, for its reasonable expenses, commissions, and counsel fees. And the complainant prays that the court will make such order or decree in the premises as may be just.

Dated August 29th, 1877.

(S'g'd) TURNER & GRANT,
For Complainant.

(Endorsed:) U. S. circuit court, dist. of Iowa. The Farmers' Loan & Trust Company ag'st The Central Railroad Co. of Iowa, &c. Report of complainant. Turner and Grant for compl't. Filed Aug. 29, '77. E. R. Mason, clerk.

51 On the same day, to wit, on the 29th day of August, 1877, N. A. Cowdrey, et al., filed in said clerk's office in said cause, application to have said road conveyed to the Iowa Central Railway Company, which said application is in the words and figures following, to wit:

52 Circuit court of the United States, district of Iowa.

FARMERS' LOAN & TRUST COMPANY,
vs.
CENTRAL R. R. OF IOWA ET AL.

To the honorable court:

The undersigned protesting against the premises being disposed of at this time in the manner and form asked for by certain persons styling themselves a New York and Boston committee claiming to be organized into a corporation called the Central Railway Company of Iowa, and reserving to himself the right to except to and appeal from any action of the court in the premises deemed prejudicial to his interest, hereby respectfully request that you will take into consideration the

articles of incorporation of the Iowa Central Railway Company—a
53 corporation to be formed by the first mortgage bond holders, beneficiaries under said force. That said articles of incorporation are submitted to the court by the complainant at the request of the undersigned.

In the event of the court approving of said articles and ordering the premises to be conveyed to said company by said Farmers' Loan and Trust Company, the undersigned will advance the money and pay all the cost, expenses, and allowances taxed or allowed by the court, and such of the receiver's debts, now amounting to about $400,000, as the court think ought at once to be paid, the undersigned subrogating himself into the place of the present holders of said claims.

The undersigned will pledge the said Iowa Central *Iowa* Railway Company to administer the road, and to apply its net earnings in the manner directed by the court in its proper order to be entered in
54 this respect; that is to say, that he will see that the net income of the road is applied to the payment of the receiver's debts and the above-named expenses and allowances until the same are all paid, before any money is paid to the bond or stockholders of said railway company.

Very respectfully, your obe. serv't,

N. A. COWDREY,
For self and other 1st mortgage Bondholders.

(Endorsed:) Farmers' Loan and Trust Company vs. Central R. R. of Iowa. Application of N. A. Cowdrey to have road conveyed to the Iowa Central R'y Co., and offer to advance money to pay court expenses. Filed Aug. 29, '77. E. R. Mason, clerk.

55 On the same day, to wit, on the 29th day of August, 1877, N. A. Cowdrey filed in said clerk's office, in said cause, exceptions to master's report of sale of mortgaged premises, which exceptions are in the words and figures following, to wit:

56 *Exceptions of N. A. Cowdrey and others, intervenors, to the sale made by the master of the mortgaged premises.*

Circuit court of the United States, district of Iowa. May term, 1877.

THE FARMERS' LOAN & TRUST COMPANY,
vs.
THE CENTRAL RAILROAD OF IOWA ET AL.

Now comes N. A. Cowdrey, and on his own behalf of all others allowed to intervene in this case with him and on behalf of all other first mortgage bondholders described in the complaint and decree in this cause, who choose to come in and contribuit to the expense hereof, and excepts to the report of the special master in this cause, filed July 27, 1877, relating to the sale of the mortgaged premises.

1st. For that the decree and order of this court required notice
57 of the sale of the premises to be advertised in a newspaper printed in the city of New York called The Financier; that said master did not advertise said sale in said newspaper, and did not report his inability to find any such newspaper to the Supreme Court of the United States, in which court this cause is now and has been pending since February 21st, 1876, by reason of the renewal of said case from this court to said U. S. Supreme Court, by appeal duly made and en-

tered in said court; that the special master did not comply with the order of this court in this respect.

2d. For that the bid made by the complainants for the purchase of said premises is and was an unauthorized bid, without authority from the deed of trust which was being foreclosed, or from the cestui que trust, or from any other authorized party whatever; that the
58 complainants making said bid have paid no money or offered to pay any sum whatever with which to pay the bondholders, the cestui que trust; none in said deed of trust. That the cestui que trust cannot be compelled by their trustee to go into the new speculation of running & operating a railroad with numerous and unknown parties, other than first-mortgage bondholders, without their previous express written assent, which they have never given.

3rd. That the bid made by the complainants of $5,192,890 is not the true amount of the purchase-money required. It is uncertain and indefinite because that it omits to assume or say anything about an indebtedness created by the court, and declared by the court to take priority in lien to the first-mortgage bonds, which prior debts are claimed to amount to over $400,000, and for the payment of which the purchaser wholly omits to provide, thus rendering its bid
59 indefinite and uncertain in amount.

On all of which said Cowdrey respectfully prays the judgment of this honorable court.

Aug. 21st, 1877.

(S'g'd) N. A. COWDREY.

(Endorsed:) No. 501. Eq. U. S. circuit c't, district of Iowa. Farmers' Loan & Trust Company vs. Central Railroad of Iowa et al. Exceptions of N. A. Cowdrey and others to master's report of sale of the mortgaged premises. Filed Aug. 29, '77. E. R. Mason, clerk.

60 On the same day, to wit, on the 29th day of August, 1877, Geo. W. Mason, by his att'y, H. G. Curtis, filed in said clerk's office in said cause his exceptions to master's report, which said exceptions are in the words and figures following, to wit:

61 THE FARMERS' LOAN & TRUST CO.
vs.
CENTRAL RAILROAD CO. OF IOWA.

GEO. W. MASON
vs.
CENTRAL RAILROAD CO.

Comes now Geo. W. Mason, judgement pl'ff in suit vs. Central R. R. Co., and objects to the motion for an order directing the payment of debts due by the receiver in installments by certificates of indebtedness, &c., as prayed in said motion, in so far as it may apply to judgement of Geo. W. Mason vs. said receiver, J. B. Grinnell. Because his said judg't is a lien on the road. Because said receiver is entitled to the possession of said road till this judg't be paid off.

Said Mason objects to the transfer of said road from the hands of the receiver till said judg't is satisfied.

62 Your complainant herein asks that said purchaser be required to satisfy said judg't of Geo. W. Mason before they are allowed

to take charge or control of said railroad, and ask that an order be made to that effect on the hearing of said motion.

(S'g'd) GEO. W. MASON,
By H. G. CURTIS,
His Atty.

(Endorsed:) The Farmers' Loan and Trust Co. vs. Central R. R. Co. Resistance of motion by purchasers. Filed Aug. 29, 1877. E. R. Mason, clerk. N. G. Curtis, att'y for Geo. W. Mason, judg't creditor.

63 On the same day, to wit, August 29th, 1877, Richard L. Ashhurst et al., by C. C. Cole, their att'y, filed in said clerk's office in said cause motion to transfer property, which said motion is in the words and figures following, to wit:

64 In the circuit court of the United States for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY, trustee,
vs.
THE CENTRAL RAILROAD OF IOWA.

Now come Richard L. Ashhurst, chairman, Thomas B. Read, Edmond Wetmore, H. J. Boardman, Charles Alexander, A. V. Lynde, John H. B. Latrobe, George T. M. Davis, and Peter Starr, joint committee of bondholders of the first and second mortgage bonds, and Isaac M. Cate, president, etc., who together represent the mortgage bondholders authorized to organize, under the direction of the trustee, the new company to become the beneficiaries of the sale under the decree herein, and present to the court the articles of incorporation adopted by said bondholders under the direction of the trustee, and submit the same to this court for its approval and sanction, and also move the court
65 for an order authorizing the trustee to convey to the Central Iowa Railway Company, organized under the articles herewith submitted, the property purchased by the said trustee, under the decree rendered herein on the 22d of October, 1875, which purchase was made at a sale by the special master on the 18th of July, 1877, and also move the court for an order directing the receiver to transfer and deliver all said property so purchased by the trustee and conveyed to the new company to said new company on the first day of September, 1877, and to take its receipt therefor, and also move the court for an order authorizing the payment by said new company of the debts contracted by said receiver in certificates of indebtedness, payable in installments of six, twelve, and eighteen months, with interest at eight per cent. per annum, payable semi-annually as per coupons annexed, and that said certificates be made the first and paramount lien upon said prop-
66 erty; and also move the court for such further and other orders as shall be necessary to place said new company in full possession and control of said property, with the to manage the same, subject only to the control of the court, so far as shall be necessary to secure and enforce payment of said certificates and of the debts subject to which said company acquires said property.

(S'g'd) C. C. COLE,
Of Counsel, &c.

(Endorsed.) 501, eq. Farmers' Loan & Trust Co. vs. Central R. R. Co. of Iowa. Mo. to transfer property, &c. Filed Aug. 29, '77. E. R. Mason, clerk. C. C. Cole.

67 On the same day, to wit, August 29th, 1877, C. C. Gilman, on behalf of the directors of the S't L., I. & M. R. R. Co., filed in said clerk's office, in said cause, articles of incorporation of S't Louis, Iowa, and Minnesota Railway Co., which said articles of incorporation are in the words and figures following, to wit:

68 *Articles of incorporation of the Saint Louis, Iowa & Minnesota Railroad Company.*

I. We, the undersigned, hereby form ourselves into an organization and body corporate, in manner provided by the statutes of Iowa, for the period of fifty (50) years, with power of renewal, if it shall expire by limitation of statute or accident, to be known by the name of the "S't Louis, Iowa & Minnesota Railroad Company," and by that name shall have power to adopt a common seal, sue and be sued, plead and be impleaded, contract and be contracted with, acquire, hold, possess, encumber and transfer both personal property and real estate, make and adopt by-laws, and do any and all other things which, by law and
69 the statutes of Iowa, like corporations have power to do; and shall be entitled to all the exemptions, privileges, and benefits of like corporations.

II. The object of this company shall be to acquire by purchase the Central Railroad of Iowa, with all its property, franchises, privileges, and power to contract and complete the said railroad from Albia, in Monroe County, Iowa, to the north line of the State of Missouri, and from Northwood, Worth County, Iowa, to the southern boundary line of the State of Minnesota, with full power to equip, operate, and maintain the same, and to perform all other acts usually performed by railroad companies.

III. The capital stock of this company shall be limited to nine million five hundred thousand ($9,500,000) dollars, which shall be divided as follows: First-preferred stock, one million two hundred and fifty
70 thousand ($1,250,000) dollars; second-preferred stock, seven hundred and fifty thousand ($750,000) dollars; common shares, seven million five hundred thousand (7,500,000) dollars.

IV. For the purpose of purchasing the first-mortgage bonds of the Central Railroad Company of Iowa with accumulated coupons due and unpaid, the company is authorized to issue an income bond in amount not to exceed four million seven hundred thousand ($4,700,000) dollars, the same to be secured in the payment of its principal at the end of thirty (30) years by a first mortgage on the property purchased of the Central Railroad Company of Iowa, consisting of its line of railway, real estate, personal property, and franchises from the southern
71 boundary of the State of Minnesota to Albia, in Monroe County, Iowa, and a second mortgage* on the same property from Albia to Moulton, Appanoose County, Iowa, or the northern boundary line of the State of Missouri, as the company may hereafter elect. This mortgage shall also be a first lien upon the net earnings of and receipts from the property mortgaged, save on that portion from Albia south, until the same shall annually pay seven per cent. on the bonds thus issued.

72 V. The preferences and priorities which the stock issue shall enjoy, and the uses to which it shall be put, shall be as follows: The one million two hundred and fifty thousand ($1,250,000) dollars of first-preferred stock shall be devoted to the absorption of the second-

* The 27 miles from Albia south can be completed for ten thousand dollars to the mile, and the money for this can be obtained by an issue of bonds in this amount, secured on this portion of the road alone.

mortgage bonds, with accrued and unpaid interest, of the Central Railroad Company of Iowa, and shall be entitled to all net earnings of and receipts from the property after the maximum yearly interest shall be paid on income bonds, until the annual dividend shall reach the sum of 7 per cent. on the dollar.

The second-preferred stock, amounting to seven hundred and fifty thousand ($750,000) dollars, or less, as the exigencies of the case may demand, shall be used to retire the third-mortgage bonds and
73 floating indebtedness of the Central Railroad Company of Iowa, and shall receive all net earnings of and receipts from the property in excess of the dividends pledged to the holders of income bonds and first-preferred stock until the sum of 7 per cent. shall be reached annually.

VI. The owners of income bonds, first and second preferred stock, shall be entitled to a voting franchise in the election of directors, and at meetings of stockholders for other purposes, in the proportion of one vote for each and every two hundred and fifty ($250) dollars held, when the same shall be registered with the transfer agent of the company, in manner to be hereafter dictated by the by-laws of the company.

74 VII. One million five hundred thousand ($1,500,000) dollars of the common shares shall be used in exchange for the common shares of the Central Railroad Company of Iowa, in the proportion of one share for four in said company, and shall be entitled to one vote for every share of one hundred dollars, and to all net earnings of the road, when the same shall exceed seven (7) per cent. annually on the bonds and stock which precede it.

VIII. Six millions of common stock or shares shall be held in reserve by the company, and shall not be issued until it can be sold at par for cash or exchanged even for any or all of the classes of securities preceding it named in article 3.

75 IX. The indebtedness of this company, aside from that created by the issue of the income bond, authorized in article four, shall never exceed the sum of one million dollars. The private property of the stockholders shall not be held liable for corporate debts.

X. The business of this company shall be managed by a board consisting of nine directors, who shall be elected at regular stockholders' meetings, to be held annually at the principal place of business of the company in Iowa, on the second Wednesday of June. Of this number four shall retain their positions for two years and five for one only, unless re-elected, providing that H. L. Huff, Geo. Staley, Sam'l R. Edgington, E. W. Eastman, J. C. Moorman, T. G. Williams, J. O. Naeum,
76 John Hall, and J. H. Cusack shall be a provisional board of directors, who shall hold their office until their successors shall be elected and qualified.

XI. In case of vacancies occurring in the board of directors, through death, resignation, or otherwise, the same can be filled by a majority of the remaining directors. The president shall issue calls for stockholders' meetings at any time, on the request of a majority of the board, in manner hereafter to be provided by by-laws, and the action of such meetings shall be considered as valid and binding upon the stockholders as if transacted at the regular annual meetings provided for in article 10. The officers of this company shall consist of president, vice-president, secretary, treasurer, transfer-agent, and superintendent.
77 The president and vice-president shall be chosen by the directors from their own number. The remaining officers named in this article shall be appointed by the board, who, with all other persons

receiving their powers in this manner, shall hold their respective places only during the pleasure of the board.

XII. The principal place of business of this company shall be at Eldora, Hardin County, Iowa, but the board of directors may hold special meetings in the cities of New York and Boston, when called in manner prescribed by by-laws to be enacted hereafter, detailing the duties of officers, agents, and other employés.

XIII. These articles of incorporation may be amended or supplemented at any meeting of the stockholders regularly called by
78 a two-thirds vote of all the parties in interest entitled to a voting power, and shall be considered valid and binding when recorded and published as required by the statutes of Iowa.

XIV. The holders of income bonds, first and second preferred stock, and of common shares, may vote at stockholders' meetings by proxy, and the books of the company shall be closed to transfer ten days before such meetings are to be held and opened the day after.

XV. This corporation shall commence on the 15th day of December, 1874, and continue until it expires by limitation of statute, with right of renewal thereafter.

NAMES OF CORPORATORS.—J. H. Cusack, T. G. Williams, W. A. Fuller, S. R. Edgington, R. H. McBride, C. B. Merrill, J. C.
79 Moorman, Ed. Gilchrist, E. I. Eastabrook, Chauncy Alberty, M. Underwood, H. L. Huff, J. J. Edgington, W. H. Thrift, E. W. Eastman, Jonathan Edgington.

The undersigned, known as the Boston committee of the bondholders of the Central R. R. Co. of Iowa, have examined the charter of the St. Louis, Iowa & Minnesota R. R. Co., as given above, and believe the provisions therein contained will secure the results recommended by us to said bondholders in a circular dated Boston, Feb'y 23d, 1875.

H. J. BOARDMAN,
CHARLES ALEXANDER,
A. V. LYNDE,
Committee.

BOSTON, *Dec. 26th*, 1874.

80 *Form of petition, to accompany bonds, which will be sent by the trustees, or A. L. Hatch, on application.*

BONDHOLDERS' PETITION.

(Form No. 4.)

To the Farmers' Loan and Trust Company, 26 Exchange Place, New York City, trustees of the Central Railroad Company of Iowa:

GENTLEMEN: I , of , State of , am the holder of first mortgage bonds, and of second mortgage bonds, of the Central Railroad Co. of Iowa, denomination , and numbered

I have received the printed report of H. J. Boardman, Cha's Alexander, and A. V. Lynde, of Boston, members of the bondholders'
81 committee, dated December 26th, 1874, with your circular.

I hereby avail myself of the protective stipulation in the mortgage of said company securing the bonds held by me; and in accordance therewith, desire you, in the execution of your trust, to purchase

said property, and deliver to me or to my order, the S't Louis, Iowa and Minnesota Railroad Company's securities to which I may be entitled by virtue of my ownership of the bonds aforementioned, providing a majority of the holders of the bonds should request like action; and the property and franchises of the Central Railroad Company of Iowa thereby pass into the hands of said company.

Under the above conditions, I hereby constitute and appoint
82 the Farmers' Loan and Trust Company of New York City my true and lawful agent, attorney, proxy for me, and in my name, stead, and behalf, to do and perform any and all acts necessary in the premises.

(Signed.)

Witness.

Dated at , 187 .

Form of receipt given by the Farmers' Loan & Trust Co., trustees, for bonds deposited with them, which are equally saleable in this market as the bonds themselves.

RECEIPT GIVEN BY TRUSTEE.

OFFICE OF THE FARMERS' LOAN AND TRUST CO.,
26 *Exchange Place, New York, Dec.* 30, 1874.

Received from first mortgage 7 per cent. bonds
83 of the Central Railroad Company of Iowa, of dollars each, and numbered , with coupons attached, from and including No's 187 . Said bonds deposited for the purpose of foreclosure of the mortgages under which they were issued.

FARMERS' LOAN AND TRUST CO.,
Trustees.

Hon. JAMES GRANT:

Please present the attached articles of incorporation to the honorable court. The company has been legally incorporated under the general laws of Iowa, and has rec'd the endorsement of several hundred bondholders, who, in evidence of their ownership, have deposited with the Farmers' Loan & Trust Co., trustees, $700,000 1st mortg., $250,000 2nd mortg.

84 Very truly yours,

(S'g'd) C. C. GILMAN,
On behalf of the Directors of the S't L., I. & M. R. R. Co.

(Endorsed:) 501 Eq. Farmers' Loan & Trust Co. vs. Central R. R. of Iowa. Articles incorporation, S't Louis, Iowa & Minn. R. R. Co. Filed, Aug. 29, '77. E. Billeson, clerk.

85 On the same day, to wit, August 29th, 1877, Richard L. Ashhurst et al. filed in said clerk's office in said cause articles of incorporation of Central Iowa Railway Co., which said articles of incorporation are in the words and figures following, to wit:

86 *Articles of incorporation of the Central Iowa Railway Co.*

ORGANIZATION.

ART. I. We, the undersigned, hereby form ourselves into an organization & body corporate in the manner provided by the statutes of Iowa,

for a period of fifty years with perpetual succession, & the right of renewal, to be known by the name of Central Iowa Railway Company, & by that name shall have power to adopt a common seal, sue and be sued, plead & be impleaded, contract & be contracted with, acquire, hold, possess, encumber & transfer both personal property & real estate, make & adopt by-laws, & do any & all other things which by law like corporations have the power to do, & shall be entitled to all the privileges, exemptions, & benefits of like corporations. This corpora-
87 tion shall begin on the eighteenth day of July, 1877, & have its principal place of business at Marshalltown, Iowa.

OBJECT.

ART. II. The object of this corporation shall be to acquire, construct, equip, maintain, & operate a railway from the north to the south line of the State of Iowa, embracing the present road & property, both real & personal, of the Central Railroad Co. of Iowa, subject to the first mortgage & to $3,700,000 of the first mortgage bonds existing & now outstanding on that property, which first-mortgage bonds this company assumes to pay, both principal & interest, in the manner hereinafter provided, together with the legal debts of the receiver. And the better to secure said bonds, this company shall execute a new mortgage on
88 all its property, estate, road, & franchises to a suitable trustee or trustees, the road to be single or double track, or partly of both, as necessity may require.

OFFICERS.

ART. III. The business of this company shall be managed by a board of eleven directors, who shall be elected at an election to take place forthwith after the transfer of the property to this company, at its principal place of business in Iowa, & on the first Wednesday of June in each year thereafter; but should the election not take place in any year on the day fixed, it may be afterwards holden by order of the board of directors. The officers of this company shall consist of president, vice-president, secretary, & treasurer, & such other officers as the
89 board may appoint. The president and vice-president shall be chosen by the directors from their number, & the other officers shall be chosen or appointed by the board of directors.

All officers shall hold their respective places during the pleasure of the board of directors, who may hold their meetings either at Boston, New York, Philadelphia, Baltimore, or elsewhere. Six of their number shall constitute a quorum for the transaction of business, & they shall have the power to fill all vacancies occurring in their number till the next annual election. The board of directors shall also have the power to appoint an executive committee of three from their number, with such powers as the board shall from time to time confer, which powers may at any time be revoked by the board.

90 CAPITAL STOCK.

ART. IV. The capital stock of this company shall be limited to six millions of dollars, in shares of one hundred dollars each, payable as these articles provide or the directors may order, & shall be divided & distributed as follows: $907,000 of first preferred stock shall be

devoted to taking up & funding coupons No. 7, 8, 9, 10, 11, 12, & 13, of the first mortgage bonds of the Central Railroad of Iowa, & shall receive such dividend in each year, not exceeding seven per cent., as the road for that year shall earn in net profits after paying the interest on the aforementioned bonds; & 1,167,800 of second preferred stock shall be given in exchange for the second mortgage bonds of the Central Railroad Company of Iowa, both principal and interest
91 up to January 15, 1876, which shall receive such dividend in each year, not exceeding seven per cent., as the road for that year shall earn in net profits after paying the interest on the first mortgage bonds & seven per cent. dividend on the first preferred stock. The remainder of the capital stock, to wit, $3,925,200 shall be known as the common stock of the company, and shall be used as far as necessary in exchange for the common stock & floating indebtedness of the Central Railroad Company of Iowa. The floating indebtedness shall receive one share of stock for each one hundred dollars; the third mortgage bond shall be received & treated as floating indebtedness only,
92 as far as it has cancelled or paid any actual bona fide debt of the Central Railroad Company of Iowa; the stockholders of said Central Railroad shall receive one share of the stock of this company in exchange for three shares of the stock of said Central Railroad Company of Iowa. Each share of stock shall be entitled to one vote, which may be cast by the holder in person or by proxy in writing, signed by one witness, at all elections and meetings of the company.

BONDS.

ART. V. The first-mortgage bond of the Central Railroad Company of Iowa shall be treated as an income bond for the term of five years only subsequent to the fifteenth day of January, 1876, the holders thereof during that interval, in lieu of coupons, to receive such rate of in-
93 terest or income thereon as the net profits of each year may enable this corporation to pay, not exceeding seven per cent. per annum; and after the five years aforesaid there shall be paid an interest of seven per cent. per annum thereon payable on the fifteenth of July & January in each year.

JOINT EXECUTIVE COMMITTEE.

ART. VI. Provided always, anything herein to the contrary notwithstanding, That the whole voting power of this company, as well in regard to the election of directors as in regard to other matters, shall be vested in the first-mortgage bondholders until the interest on their bonds shall have been regularly paid for five years, or until they elect to transfer the same to the stockholders; and this power, in all
94 particulars, shall be exercised by the joint committee of bondholders, or a majority thereof, being the same persons heretofore known as the New York & Boston Committee of Bondholders, to wit: Richard L. Ashhurst, Thomas B. Reed, Edmund Wetmore, H. J. Boardman, Charles Alexander, A. V. Lynde, John H. B. Latrobe, Geo. T. M. Davis, Peter Starr. Seven shall constitute a quorum of the committee, who shall have the power to fill vacancies in their number. But the power to vote thus delegated may be revoked & exercised directly by the holders of a majority of the outstanding first-mortgage bonds whenever they so elect.

95 LEASE.

ART. VII. The power to lease the road shall, prior to January 15, 1881, be vested in the board of directors & the joint executive committee in concurrence, & subsequent to that date shall be vested in the board of directors.

LIABILITY.

ART. VIII. The private property of stockholders of this company shall be exempt from corporate debts.

SPECIAL MEETINGS.

ART. IX. Special meetings of the stockholders may be called by the directors, or by the president & the executive committee of the board of directors, for the transaction of any special business.

96 AMENDMENTS.

ART. X. These articles, except articles V, VI, VIII, X, & XI, may be amended at any annual meeting of the stockholders by a vote of two-thirds of all the stock issued, and a record of the same as provided by law; said articles V, VI, VIII, X, & XI shall not be amended or altered; nor shall the provisions of article IV, relative to the first & second preferred stock, be changed.

FORECLOSURE.

ART. XI. It shall be further ordered & decreed that, if at the expiration of the five years aforesaid there should be a failure to pay the interest on the first-mortgage bonds aforesaid, then the court shall make the foreclosure of the first mortgage absolute, & pass such further order as may seem just and equitable in the premises.

97 INDEBTEDNESS.

ART. XII. The highest amount of indebtedness or liability to which this company shall at any one time be subject shall not exceed $4,000,000.

RICHARD L. ASHHURST.
THOMAS B. REED.
EDMUND WETMORE.
H. J. BOARDMAN.
CHARLES ALEXANDER.
ALONZO V. LYNDE.
JOHN H. B. LATROBE.
GEO. T. M. DAVIS.
PETER STARR.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, the undersigned, a commissioner for the State of Iowa at Philadelphia, Penn'a, on this seventh day of August, A. D. 1877, personally appeared Richard L. Ashhurst, to me personally known to be the identical person who signed the foregoing articles of incor-
98 poration of the Central Iowa Railway Company as one of the corporators thereof, and duly acknowledged that he voluntarily

signed & executed the same as one of the corporators of said company, for the purposes therein set forth, the same being his voluntary act and deed.

In witness whereof, I have hereunto set my hand and seal of office, the day and year first aforesaid.

[SEAL.] FRANCIS C. FALLON,
Commissioner for Iowa.

(Endorsed:) 501 eq. Farmers' Loan & Trust Co. vs. Central Railroad Co. of Iowa. Articles of incorporation of Central Iowa Railway Co. Filed Aug. 29, '77. E. R. Mason, clerk.

99 Afterwards, to wit, on the 30th day of August, 1877, O. L. Garrison, sec'y of Vulcan Iron Works, filed in said clerk's office in said cause exceptions to master's report of sale, which said exceptions are in the words and figures following, to wit:

100 ST. LOUIS, *Aug.* 23*d*, 1877.

Statement of certificates of J. B. Grinnell, receiver of the Central Railroad of Iowa, held by the Vulcan Iron Works of St. Louis, Mo., given in settlement of railroad iron.

Date of certificate.	Time.	Amount.
July 16	4 mo's	2,000
" 22	4 "	4,228 68
Aug. 15	4 "	2,550 96
Total		8,779 64

101 [D. K. Ferguson, pres't.; D. R. Garrison, V. P.; O. L. Garrison, sec'y. Vulcan Iron Works. Manufacturers of Bessemer steel and iron rails, pig iron, foundry and Bessemer. Office 221 Olive street.]

ST. LOUIS, *Aug.* 23, 1877.

Hon. JOHN F. DILLON,
Judge U. S. Circuit Court, Des Moines, Iowa:

DEAR SIR: We beg to enclose you a statement of our ⅔ with the receiver of the Central Railroad of Iowa, and learning that some action is to be taken in your court on the 27th inst. looking to the settlement of these debts, we pray that our claims may be adjusted as speedily as possible, for we have given the receiver several extensions on his paper, and the amount is rather heavy to carry these times.

102 If a representation by att'y is necessary, won't you please have the clerk of your court notify us by wire, and oblige,

Yours, resp'y,

(S'g'd) O. L. GARRISON, *Sec'y.*

(Endorsed:) No. 501 eq. U. S. circuit court, dist. of Iowa. Farmers' Loan & Trust Co. vs. Central R. R. of Iowa et al. Exceptions of Vulcan Iron Works to master's report of sale. Filed Aug. 30, 1877. E. Rellason, clerk.

103 On the same day, to wit, August 30th, 1877, W. C. Walkewitz and Co. filed in said clerk's office in said cause exceptions to master's report of sale, which said exceptions are in the words and figures following, to wit:

104 In the U. S. circuit court for the district of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY, trustee, *vs.* THE CENTRAL RAILROAD COMPANY OF Iowa. } No. 501. Equity.

To :

You are hereby notified that on the 18th day of July ultimo the Central Railroad of Iowa was sold under the decree rendered in this cause by the United States circuit court for the district of Iowa, October 22, 1875, and that at such sale the complainant, the Farmers' Loan and Trust Company, trustee, bid in the property, pursuant to an order in the decree, for the benefit of the first mortgage bondholders, and others, as in the decree specified.

105 You are also notified that on the 29th day of August, 1877, a motion will be made to the United States circuit court, at its adjourned term to be then held in the Federal court-room, in Des Moines, for the transfer or delivery of the possession of said railroad and its appurtenances to the new company organized under said decree, called the Central Railroad Company of Iowa, which company is the beneficiary for whom the purchase was made at the said sale, and which company is composed of the mortgage bondholders of said Central Railroad of Iowa, the defendant in the above-entitled cause; and that the motion for said transfer of possession will be accompanied with a motion for an order directing the payment by installments of the debts contracted by the receiver of said company in certificates of indebtedness or

106 debentures, to be issued under the direction of the court, payable at such future time, not exceeding eighteen months, as the court shall order, with interest (say at eight per cent. per annum), payable semi-annually, and which certificates of indebtedness or debentures shall be negotiable, and shall constitute the first and paramount lien upon the said property so transferred; and to perfect and effectuate such lien the court will retain such judicial control over the new company, and the property transferred to it, as shall be necessary to enforce the payment of said certificates of indebtedness without other suit or action.

This notice is given to you in order that you may, if you please, appear at said term of court on the 29th day of August inst. and object, if any objection thereto you may have.

RICHARD L. ASHHURST,
Chairman.

107

THOMAS B. REED,
EDMUND WITMORE,
H. J. BOARDMAN,
CHARLES ALEXANDER,
A. V. LYNDE,
JNO. H. B. LATROBE,
GEO. T. M. DAVIS,
PETER STARR,
Committee.

ISAAC M. CATE,
President.

AUGUST 13, 1877.

[Excelsior White Lead and Color Works. C. Wolkewitz and Co., manufacturers of white lead, putty, colors, zinc plants, and dealers in varnishes, window glass, paints, oils, & naval stores No. 623 N. Main St., S. W. cor. Green Street.]

ST. LOUIS, *Aug.* 21st, 1877.

Judge DILLON,
U. S. Dist. Court of Iowa, Des Moines, Iowa:

108 We enclose circular, which explains itself. We do most strenuously object to any compromise such as it suggests or any compromise of any description. The goods for which we hold company's receiver's acceptance was bought on not longer time than 90 days, and is long past due.

The railway officials have delayed payment from time to time. It is useless for us to apply to them for redress, and are compelled to look to you for justice in the matter. And hope you will give it the consideration it demands.

Yours' respectfully,
(S'g'd.) W. C. WOLKEWITZ & CO.

(Endorsed:) No. 501. Eq. Farmers' Loan and Trust Co. vs. Central R. R. of Iowa et al. U. S .circuit court, dist. of Iowa. Exceptions of W. C. Wolkewitz & Co. to master's report of sale. Filed Aug. 30, 1877. E. Billason, clerk.

109 Afterwards, to wit, on the 31st day of August, 1877, Turner and Grant for complainant filed in said clerk's office in said cause request of bondholders to complainant to appeal, which said request is in the words and figures following, to wit:

110 *Request of bondholders to the complainant that complainant would take an appeal.*

Circuit court of the United States district of Iowa.

FARMERS LOAN AND TRUST COMPANY, TRUSTEES, complainants,
vs.
CENTRAL RAILROAD OF IOWA, ET AL.

To the complainants:

GENTLEMEN: The undersigned, your cestui que trust in the above-entitled case, hereby respectfully request you to take an appeal to the Supreme Court of the United States, issue all order and decrees made in this case giving a preference in lien or in payment to debts due from the defendant on the mortgage debt of which you are the trustees, amounting as we are informed and believe to about the sum of $350,000.

Also that you will take an appeal from and order confirming the
111 sale of the mortgaged premises and a distribution of the procedes made Aug. 31st, 1877.

We will give you sufficient indemnity to secure you against all loss or damage by reason of your taking said appeal.

Aug. 31st, 1877.

Respectfully, your ob'd. servants,

RUSSELL SAGE.
EDWIN PARSONS.
FREDERICK G. SERLE.
JAMES BUELL.
T. P. JAMES.
N. A. COWDREY.

(S'g'd) By their attorney,

N. A. COWDREY.

Service of the within request is hereby admitted, and the complainants decline to take the appeals requested.

August 31, 1877.

(S'g'd) TURNER AND GRANT,
For Complainant.

(Endorsed:) 501. Eq. Farmers' Loan and Trust Co. vs. Central R. R. of Iowa. Request of bondholders to compl't to appeal from orders or decrees. 21 Oct., 1870, and 31 Aug., 1877. Filed Aug. 31, '77. E. R. Mason, clerk. N. A. Cowdrey, for bondholders.

112 On the same day, to wit, August 31st, 1877, Russell Sage et al. filed in said clerk's office in said cause, application for an appeal, which said application is in the words and figures following, to wit:

113 *Application of Russell Sage & others for an appeal made in open court Aug. 31st, 1877.*

Circuit court of the United States, district of Iowa, May term, 1877.

FARMERS' LOAN & TRUST COMPANY, TRUSTEE,
vs.
THE CENTRAL RAILROAD OF IOWA.

Now comes Russell Sage, Jones Buell, and N. A. Cowdrey, by liberty of the court intervenors in the above-entitled cause, and represents to this court that the intervenors have requested the complainants to take the appeal herein below asked for, which request the complainant refused.

Whereupon the said intervenors, in their own behalf as cestui que trust of the complainants, and in behalf of all others similarly
114 situated who choose to come in and contribute to the expense hereof, now in open court apply for an appeal from certain orders and decrees herein below named to the next term of the Supreme Court of the United States to be held at the city of Washington on the 2d Monday of October, 1877, viz:

From the decree or order made October 21st, 1875, in this cause, directing the payment of $125,736 to John S. Newberry, James McWilliams, and Warren Currier, and declaring the same to be a lien upon the railroad and premises described in the complaint prior to the lien of the mortgage and bonds secured thereby, to foreclose which this writ is brought.

From the decree or order of this court made October 21st, 1875, directing the receiver to pay Horace Abbott, Tho's Kensett, John S. Gilman, Isaac M. Cate the sum of $44,769.78 before the payment of any money to said bondholders.

115 From the decree or order of this court, made October 21st, 1875, directing the receiver to pay the Mowery Car Company the sum of $47,031.74 before the payment of any money to said bondholders.

From the decree or order of this court, made October 21st, 1875, directing the receiver to pay to the Harkell & Barker Car Company the sum of $6,571.18, before the payment of any money to said bondholders.

And from the order and decree of the court, made August 31st, 1877, confirming the sale of the mortgaged premises made, as claimed, in pursuance of an order made Oct. 22d, 1875, and ordering a distribution of the proceeds of said sale.

And from each and every other order of the court made in this cause August 31st, 1877.

The intervenors herewith tender to the court a good and sufficient bond as said appeal, and pray that the same may be allowed and approved as a supercedeas bond on the orders and decrees made.

And we will, in duty bound, ever pray.

August 31st, 1877.

RUSSELL SAGE,
JAMES BUELL,
N. A. COWDREY,
By N. A. COWDREY,
Solicitor.

(Endorsed:) U. S. circuit court, district of Iowa. Farmers' Loan & Trust Company, trustee, vs. Central Railroad of Iowa et al. 2d appeal of Russell Sage and others. Filed Aug. 31, 1877. E. R. Mason, clerk.

On the same day, to wit, August 31st, 1877, the court, in rendering judgment on the exceptions, delivered the following opinion, to wit:

Adj'd term, Aug. 31, '77.

FARMERS' LOAN AND TRUST COMPANY
vs.
CENTRAL RAILROAD OF IOWA.

DILLON, Circuit J.:

We have considered the exceptions of Mr. Cowdrey and others to the master's report of sale, and are of opinion that they must be disallowed. The plaintiff, notwithstanding the pending appeal, has right to execute the decree, the supersedeas having been vacated. It was incidental to this right which remains in this court to make the order substituting the "Public" in the place of the "Financier," more especially as the evidence produced before me, when the order was made, showed the two papers to be the same, the change being one of name only.

At all events, the object of the notice was publicity, and the requirements of the decree in this respect have been substantially complied with, whether a majority of the present holders of bonds have assented, or shall assent, in writing to the articles of incorporation. When that fact is reported to us, we will direct the trustee to convey the premises to it.

It is for the bondholders and not the court to determine what corporation or company is or shall be entitled to the property. The other exceptions are based upon supposed errors in the decree. But while that decree remains unreversed it must be accepted and treated by this court as correct. The master in making the sale has followed the decree. The exceptions to his report are overruled, and the motion to confirm the sale is granted; and the master is directed to execute a deed to the trustee pursuant to the terms of the decree.

LOVE, J., concurs.

SAME CASE.

DILLON, circuit judge:

The several motions to order the property to be conveyed by the trustee to one or other of three new companies must be denied for the reason that, under the decree and the deed of trust, no evidence is before us "that the holders of a majority of the outstanding

bonds secured by *by* the first mortgage have in writing requested or directed," or assented to the articles of incorporation of either of said new companies. This written request or assent on the part of the present holders of said bonds to the articles of incorporation is expressly required by the deed of trust, and it is not changed by the decree.

The decree and the deed of trust must be construed together. This written request or assent must be produced either to the trustee or to this court or the master before either the trustee or the court is authorized to convey the premises to the new corporation. Such is the express requirement of the deed of trust.

If the parties desire, we will appoint the master to act in this matter in the place of the trustee, and direct him to proceed without de-
121 lay to ascertain. We see no substantial objection to the scheme proposed in the order submitted to us for providing for the receiver's debts, but as this is dependent upon a conveyance to the new company no absolute order in this respect can be entered at this time.

We mention this now, so that the creditors and bondholders may be apprised of our views.

LOVE, J., concurs.

(Endorsed:) F. L. & T. Co. vs. Central R. R. of Iowa. Op. 31 Aug., '77. Filed Aug. 31, 1877. E. R. Mason, clerk.

122 On the same day, to wit, August 31st, 1877, the same being of the May term, 1877, of the said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

123 United States circuit court, district of Iowa, May term, 1877.
Friday, August 31, 1877.

THE FARMERS' LOAN AND TRUST CO., TRUSTEES, &c.,
vs.
CENTRAL R. R. CO. OF IOWA. } No. 501. Eq.

And now on this 31st day of August, 1877, it being of the May term, (adjourned), this cause came on for hearing, upon motion of the complainant to confirm the report of the sale made by the master, and for conveyance pursuant thereto; and upon the exceptions of N. A. Cowdry and others to said report, and also upon the motion of R. L. Ashhurst and others for an order for the transfer of said property to a new company organized pursuant to the decree and the compromise whereon the same was based, called the Central Iowa Railway Company, and also for an order authorizing said new company to pay the debts
124 of the receiver and other prior lien debts, by certificates of indebtedness payable in installments of six, twelve, and eighteen months, with eight per cent. per annum interest, payable semi-annually; and the court having fully heard counsel and parties in respect to all said motions and being fully and sufficiently advised in the premises, does now and here order, adjudge, and decree, that the exceptions filed by N. A. Cowdry, for himself and others, to the report of the master of the sale of the property, &c., be, and the same are hereby, overruled, and the court finding as a matter of fact that said sale has been made in strict accordance with the decree, the same is hereby fully confirmed and approved.

It is further ordered, adjudged, and decreed that the special master, L. M. Fisher, do execute to the Farmers' Loan and Trust Company, trustees, a conveyance of the said property so sold by him, and the convey-

ance executed by said master being presented in open court is approved and ordered to be delivered to the said trustee, and to be recorded.

125 In respect to the motion ordering the trustee to convey said property to the new company organized by the first mortgage bondholders, and to transfer the possession of said property to such new company, the court now here decrees, adjudges, and orders as follows, to wit: That since it is provided by the first mortgage that the new company to which the property shall be transferred after being purchased by the trustee "shall be organized upon such terms, conditions, and limitations, and in such manner, as the holders of the majority of said outstanding bonds secured by this mortgage shall in writing request or direct," and which said provision is substantially embraced in and required by the fourth paragraph of the decree rendered herein on October 22, 1875, and since it is not made now and here properly to appear to the court that the articles of incorporation presented have had such approval in writing, L. M. Fisher, esq., is hereby appointed special commissioner for the purpose of taking the requests in

126 writing of the first mortgage bondholders and their approval or disapproval of the terms, conditions, and limitations prescribed by the new company to which they shall desire said property to be conveyed, and for that purpose the commissioner may visit the following places: Bangor, Lewiston, and Portland, in the State of Maine; Boston and Northampton, in the State of Massachusetts; Concord in the State of New Hampshire; Troy, Schenectady, Utica, Little Falls, Binghampton, Geneseo, Poughkeepsie, Cazenovia, and the city of New York, all in the State of New York; Philadelphia, in the State of Pennsylvania; and the city of Baltimore, in the State of Maryland, and that the master shall insert a brief notice in some paper published in each of such places of the time and place at which he will take proofs of ownership and approval by the holder, of said bonds, and will also notify said bondholders by mail of such time and place, as far as he shall find the same practicable.

The commissioner will submit to the several bondholders appearing before him the several plans or articles of incorporation for

127 the proposed new company, which shall be furnished him by any of the bondholders for such purpose, and shall take the written approval of each bondholder upon the plan or organization he shall prefer, and his request for the transfer of the property to such company. The commissioner will not take the vote, approval, or request of any one claiming to be a bondholder until such person shall first produce to him for his personal inspection the bond held by the party claiming to make his vote, approval, or request, or the receipt of the Farmers' Loan & Trust Company for such bond, and the commissioner will cause to be endorsed upon the written or printed approval of each bondholder the number and amount of the bond or bonds he holds. And in order that each owner or holder of bonds may produce the same in person instead of the receipt therefor, if he shall so prefer, the trustee, The Farmers' Loan and Trust Company, the complainant herein, is directed to return to the owners any of such bonds which may be in their

128 possession or may have been deposited with them for safe-keeping or otherwise, upon the written request of such owner or his assigns, and the surrender of the trustee's receipt therefor.

And the commissioner will proceed in the discharge of this duty at the earliest convenient day, and make his report in writing as soon as he shall find the same practicable. And upon the coming in of said report by the commissioner the court will order the trustee to convey the property to the company approved by the majority of the first

mortgage bondholders, and will order the immediate transfer and delivery of such property to such new company.

In respect to the motion allowing the payment of the debts of the Central Railroad Company of Iowa, contracted by the receiver or incurred during the pendency of this action, in certificates of indebtedness in installments of six, twelve, and eighteen months, with interest at eight per cent. per annum, which certificates shall be secured
129 by being made the first and permanent lien upon the property, the court finds that it is not necessary to enter such order at this term, but the court does find that the necessity for some provision of that kind exists, and upon examination the plan proposed by the order submitted seems to the court to be unobjectionable, and unless some special cause shall be shown against said order, the same or some other suitable provision will be made of record concurrently with the order for conveyance by the trustee to the new company, and the transfer and delivery of the possession of the property, books, assetts, etc, to said new company.

(Signed) JOHN F. DILLON.
J. M. LOVE.

(Endorsed:) No. 501. Eq. Farmers' Loan & T. Co. vs. Central R. R. of Iowa et al. Decree. Filed Aug. 31, '77. E. R. Mason, clerk.

130 United States circuit court, district of Iowa. May term, 1877.
Wednesday, August 29, 1877.

FARMERS' LOAN & TRUST CO., TRUSTEE,
vs.
CENTRAL RAILROAD OF IOWA. } No. 501. Eq.

This cause coming on this day for hearing on the application of Russell Sage and others for an appeal from the decree entered this day herein, and from other orders of this court in this cause, and the court being advised in the premises—

It is ordered, adjudged, and decreed that the appeal prayed be allowed, and that the appeal bond be fixed at the sum of $1,000^{00}$, to be approved by one of the judges of this court.

It is further ordered that the application for a supersedeas be, and the same is hereby, denied.

131 Afterwards, to wit, on the 11th day of October, 1877, Russell Sage et al. filed in said clerk's office in said cause an appeal bond, which said appeal bond is in the words and figures following, to wit:

132 *Bond on appeal.*

Circuit court of the United States, district of Iowa. May term, 1877.

THE FARMERS' LOAN & TRUST COMPANY, complainant, Russell Sage, James Buell, and N. A. Cowdrey, intervenors, complainants,
vs.
THE CENTRAL RAILROAD COMPANY OF Iowa, and others, defendants. } In equity. No. 501.

Know all men by these presents that we, Russell Sage and N. A. Cowdrey, are held and firmly bound unto the clerk of the circuit court

of the United States for the district of Iowa, in trust for the parties to the above-named suit as their interest may appear, in the sum of one thousand dollars lawfull money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally.

The condition of this bond is such, that whereas at a term of the circuit court of the United States for the district of Iowa, held on *on*
133 the 2d Monday of May, 1877, viz, August 31st, 1877, in the suit above named, defending in said court, by which the intervenors in said case were injured and aggrieved, as were fully set forth in their petition asking for an appeal from said orders and decrees, and the said intervenors, being in open court, asked for and obtained an appeal from said orders and decrees to the Supreme Court of the United States, and filed a copy thereof in the office of the clerk of said circuit court for the district of Iowa:

Now, therefore, if said intervenors, or either of them, shall prosecute said appeal to effect and answer all damages and cost if said appeal is not made good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals at the city of New York this 24th day of September, 1877.

(S'g'd) RUSSELL SAGE. [L. S.]
" N. A. COWDREY. [L. S.]

Approved by me, and the clerk is directed to file the same in the above-entitled cause.

(S'g'd) J. M. LOVE, *Judge*.

Filed Oct. 11, 1877.

E. R. MASON, *Clerk*.

134 And on the 22d day of September, 1877, Russell Sage et al. filed in said clerk's office, in said cause, petition for supersedeas bond, which said bond is in the words and figures following, to wit:

135 *Petition of Russell Sage, James Buell, and N. A. Cowdrey, intervenors, for approval of bond on appeal, to operate as a supersedeas bond.*

Supreme Court of the United States.

FARMERS' LOAN AND TRUST COMPANY, Complainants, Russell Sage, James Buell, and N. A. Cowdrey, intervenors, complainants,
vs.
THE CENTRAL RAILROAD OF IOWA ET AL., defendants.

To the honorable Ward Hunt, associate justice of the Supreme Court of the United States.

The petition of Russell Sage, James Buell, and N. A. Cowdrey, all citizens of the city of New York, respectfully shows: That the
136 circuit court of the United States for the district of Iowa has made an order or decree in the above-entitled case at its May term, 1877, viz, Aug. 31, 1877, confirming the sale of the railroad of the defendants, and ordering a distribution of the proceeds of the sale. That your petitioners were injured and aggrieved by said orders and

decrees, and in open court took an appeal to the Supreme Court of the United States, which appeal was there and then allowed by the court, but no supersedeas bond was given or approved.

Your petitioners now desire to have the execution of said orders and decrees stayed until the Supreme Court has determined said appeal, and here tender to your honor a good and sufficient bond in the
137 penal sum of $20,000, which they pray your honor to approve, and allow the same to operate as a supersedeas bond in the above-entitled cause.

Your petitioners further show that the action is one to foreclose a railroad mortgage, which mortgage covers the entire property of the defendant, the Central Railroad Company of Iowa. That said railroad company is a bankrupt company, and wholly unable to pay its debts; that said U. S. circuit court has heretofore appointed its receiver, who is now, and *and* since 1874, has been in possession of the entire property of the said defendant, and is operating said railroad under and in pursuance of the orders of said circuit court; that no party to the suit can suffer damages by reason of said appeal and supersedeas
138 because the court is in possession of the premises, and will protect all parties in interest; that said court made an order or decree of foreclosure in said entitled suit, on the 22nd day of October, 1875, and also a similar order on the 14th day of January, 1876, from which orders or decrees your petitioners took an appeal to the October term, 1876, of the Supreme Court of the United States, which appeal is now pending in said court and will be duly heard when reached on its calendar or docket; that said Supreme Court at its last term retained the appeal but held that the bond was not given in time to act as a supersedeas bond. Wherefore your petitioners now have appealed from the decree confirming the sale of said road pursuant to the decree of
139 foreclosure, and respectfully petition your honor to allow a stay of the execution of the decree confirming said sale.

And your petitioners, as in duty bound, will ever pray, &c.

New York, Sept. 15th, 1877.

(S'g'd) RUSSELL SAGE.
" JAMES BUELL.
" N. A. COWDREY.

CITY & STATE OF NEW YORK, *ss:*

SEPT., 1877.

Personally appeared before the undersigned authority Russell Sage, James Buell, & N. A. Cowdrey, and each for himself made oath that the foregoing petition is true.

[SEAL.]

W. J. MOONEY,
Notary Public, N. Y. Co.

(Endorsed:) Supreme Court of the U. S. Farmers' Loan & Trust Co. et al. vs. Central R. R. of Iowa et al. Petition to Associate Justice Hunt for supersedeas bond. Filed Sept. 22, 1877. E. Rellason, clerk.

140 On the same day, to wit, September 22d, 1877, Russell Sage et al., filed in said clerk's office, in said cause, supersedeas bond, which said supersedeas bond is in the words and figures following, to wit:

141 *Bond on appeal.*

Circuit court of the United States, district of Iowa, May term, 1877.

THE FARMERS' LOAN AND TRUST COMPANY, complainants, Russell Sage, James Buell, and N. A. Cowdrey, intervenors, complainants, *vs.* THE CENTRAL RAILROAD COMPANY OF IOWA and others, defendants. } In equity. No. 501.

Know all men by these presents, that we, Russell Sage, James Buell, and W. A. Cowdrey, are held and firmly bound unto the clerk of the circuit court of the United States for the district of Iowa, in trust for the parties to the above-named suit, as their interest may appear, in the sum of twenty thousand dollars, lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally.

142 The condition of this bond is such that whereas, at a term of the circuit court of the United States for the district of Iowa, held on the second Monday of May, 1877, viz, August 31, 1877, in the suit above-named, depending in said court, in equity, a certain order or decree was made by said court, by which the intervenors in said case were injured and aggrieved, as more fully set forth in their petition asking for an appeal from said orders and decrees. And the said intervenors having in open court asked for and obtained an appeal from said orders and decrees to the Supreme Court of the United States, and filed a copy thereof in the office of the clerk of said circuit court for the district of Iowa:

Now, therefore, if said intervenors, or either of them, shall prosecute said appeal to effect and answer all damages and costs if said appeal is not made good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals, at the city of New York, this 15th day of September, 1877.

(S'g'd.) RUSSELL SAGE. [L. S.]
" JAMES BUELL. [L. S.]
" N. A. COWDREY. [L. S.]

143 Approved by me, to operate as a supersedeas when the same is filed in the office of the clerk of the circuit court of the United States at Des Moines, Iowa.

Sept. 17th, 1877.

(S'g'd) WARD HUNT,
Associate Justice Supreme Court of the United States.

STATE OF NEW YORK,
City and County of New York, ss:

SEPT. 15th, 1877.

Personally appeared Russell Sage, James Buell, and N. A. Cowdrey, the signers of the foregoing obligation, and each for himself made oath that he was worth over the sum of forty thousand dollars, after the payment of all debts, and that they, each of them, had over twenty thousand dollars' worth of unincumbered property in the State of Iowa.

Attest.

[SEAL.] (S'g'd) J. W. MOONEY,
Notary Public N. Y. Co.

(Endorsed:) Circuit court of the U. S., district of Iowa. Farmers' Loan & Trust Co. vs. Central R. R. of Iowa et al. Bond on appeal from order conferring sale of R. R. Filed Sep. 22, 1877. E. R. Mason, clerk.

144 *Assignment of errors by appellants.*

Supreme Court of the U. S, October term, 1877.

RUSSELL SAGE ET AL.
vs.
CENTRAL RAILROAD OF IOWA ET AL. } No. 937.

1st. We assign for errors the same as were assigned in a former appeal between the same parties at the October term, 1876, of this court, viz:

"*Assignment of errors. October term*, 1876.

"1st. The circuit court attempted to force different and inconsistent duties and trust upon the trustee, from what the parties in interest had themselves, by the trust deed, established.

"2d. The 4th paragraph, or head of the decree, is erroneous, and should be reversed, except so much of it as appoints a master to make the sale, and gives instruction to the master what and how to do.

"3d. The 5th paragraph, or head of the decree, is erroneous, and should be modified, as shown in the accompanying form of proposed decree.

"4th. The 6th paragraph, or head of the decree, is erroneous, in so far as it discriminates in the terms of purchase in favor of the complainant. The sale should be an open one to all persons upon the same terms.

"5th. The 7th and 8th paragraphs are erroneous, and should be omitted.

"6th. The 9th paragraph is erroneous, and should be so modified as to state the exact amounts due upon the class of claims there named, so that any proposed purchaser would know the amount, or the approximate amount, of such claims as he would have to pay or assume."

145 2nd. The circuit court erred in overruling the exceptions filed by the appellants in said court.

3rd. The circuit court erred in directing and disclosing all the debts contracted by the receiver to be "a first and permanent lien upon all said property and all additions thereto to all other liens," &c., in this, that said declaration in effect made certain contract debts of the defendant company prior in lien to the first-mortgage bonds of the appellants and others, viz, contracts and debts said to be due to—

John S. Newbery & Co	$125,736
Isaac M. Cate and others	44,769 78
Mowery Car Company	47,031 74
Harkel and Barker Car Company	6,571 18
	$224,108 70

and declaring that said circuit court would enforce the same without other action thereon, &c.

4. The circuit court erred in ordering and decreeing certain
146 undefined alleged debts, said to be provided for in paragraph 8 of the decree of sale, to be liens upon the premises and prohibiting the beneficiaries of the purchase from having or enjoying any benefits of the property until said indefinite and undetermined debts are satisfied and discharged.

5th. The appellants will avail themselves of each and all other errors manifest upon the record in each appeal.

N. A. COWDREY,
Solicitor for Appellants.

(Indorsed:) Supreme Court U. S. Russell Sage et al., appellants, vs. Central R. R. of Iowa et al., appellees. Assignment of errors. October term, 1877.

(Indorsed:) Supreme Court U. S. 1877, October term. No. 937. Russell Sage et al., app., vs. The Central Railroad of Iowa & al. Assignment of errors. Filed 1st November, 1877.

147 In the circuit court of the United States for the district of Iowa.

I, Ed. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true, and complete copies of the report of L. M. Fisher, master on sale of road; proof of publication of Iowa State Register; protest of N. A. Cowdrey et al.; protest of Ezra H. Linley; motion of trustee to confirm sale; report of trustee; application of N. A. Cowdrey to have road transferred; exceptions of N. A. Cowdrey et al. to report; exceptions of Geo. W. Mason to master's report; articles of incorporation of S't Louis, Iowa & Minnesota Railway Co.; articles of incorporation of Central Iowa Railway Co.; exceptions of Vulcan Iron Works; exceptions of W. C. Wolkewitz & Co.; request of bondholders to complainant to appeal; application for an appeal by Russell Sage et al.; opinion of court; appeal bond; petition for supersedeas bond; supersedeas bond; record entries and decree; and all things concerning the same, in a certain cause in said court wherein Farmers' Loan and Trust Company, trustee, is plaintiff, and Central Railroad of Iowa et al. are defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this sixteenth day of October, A. D. 1877.

[SEAL.]

EDWARD R. MASON,
Clerk U. S. C. C., District of Iowa.

(Indorsement on cover:) No. 570. Russell Sage, James Buell, & N. A. Cowdrey, intervenors, appellants, vs. The Central Railroad Company of Iowa et al. Iowa C. C. U. S. Filed 22d October, 1877.

Supreme Court of the United States.

Nos. 175 and 570. *October Term*, 1878

RUSSELL SAGE, *et. al.*,
Appellants,

vs.

THE CENTRAL RAILROAD OF IOWA,
Appellees.

Brief of N. A. COWDREY, for Appellants.

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Supreme Court of the United States.

RUSSELL SAGE, *et. al.*,
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THE CENTRAL RAILROAD OF IOWA,
Appellees.

Nos. 175 and 570.
October Term, 1878.

Brief of N. A. COWDREY, *for Appellants.*

STATEMENT OF FACTS.

The Central Railroad of Iowa are or were the owners of a Railroad, wholly situated in the State of Iowa—extending from Northwood near the north line of the State, in Worth County, southerly to Albia, in Monroe County, a distance of about 190 miles.

On the 15th day of July, 1869, the Railroad Company mortgaged all its property to the Farmers' Loan and Trust Company, Trustee, in trust to secure the payment of $3,700,000 with interest. It made default in the payment of interest January 15th, 1873.

June 2d, 1874.—Charles Alexander and other, holders of bonds secured by said mortgage, on their own behalf and on behalf of all other holders of said bonds, filed their bill of complaint in the suit which is now before this Court on appeal, against the Railroad Company making the Farmers' Loan and Trust Company a defendant therein—asking for the foreclosure and sale of said Railroad. Alexander's Complaint, p. 1.

Copies of the mortgage are to be found on pages 12, 33, 55, 725, 749 of printed record. One copy commencing on each of said pages.

August 27th, 1874.—Alexander and others, bondholders, on their own behalf and on behalf of all other bondholders, filed an amended and substituted bill of foreclosure and sale against the same defendants, p. 20.

On the 30th of Sept., 1874.—The Farmers' Loan and Trust Company, one of the defendants, made answers to the complaint, which being argued Oct. 14th, 1874, resulted in the parties consenting to dismiss their bill of complaint as against the Farmers' Loan and Trust Company; and the said Trust Company were given leave to file a bill and became complainants, p. 42.

On the same day, Oct. 14th, The Farmers' Loan and Trust Company filed a bill of complaint against the Railroad Company, auxiliary to that of Alexander, *et. al.*, p. 42, "on behalf of the bondholders."

Oct. 16th, 1874.—The Court made an order consolidating the various bills of complaint, p. 66.

On Jan. 4th, 1875, the Railroad Company demurred to complaint, p. 69.

Jan. 30, 1875.—The Farmers' Loan and Trust Company amended its bill of complaint by making new parties, p. 74.

March 2d, 1875.—Demurrer over-ruled.

March 25th, 1875.—The Railroad Company, defendant, made answers to bill of complaint, denying among other things, p. 80, paragraph 22½, that complainant could maintain this action, because it did not appear that complainant had complied with a condition precedent, which required a majority of the bondholders to express their election and option that a foreclosure take place; the same question was raised by the demurrrer and over-ruled. (See p. 58, provisions of mortgage.)

Jan. 7, 1875.—Court appointed Hiram Price, Special Commissioner, to examine property; his report is found on p. 190, appointment, on p. 258.

May 1st, 1875.—Isaac M. Cate and others filed a petition to be paid for four locomotives $28,875, p. 85 and 777.

Copy of lease made by Isaac M. Cate, President, to Isaac M. Cate, *et. al.*, of said locomotives, dated Oct. 15th, 1873, p. 87.

Oct. 21st, 1875.—The Court made an *exparte* order directing the Receiver to pay Isaac M. Cate, *et. al.* $44,769.78, for said four locomotives with interest, from April 1st., 1875, at 7 per cent.

May 14th, 1875.—The Court on its own motion so far as appears from the record, referred certain claims, for ties, cars and locomotives to which the vendors retained a title to Hon. Geo. B. Wright, to report &c., p. 213. Report made recommending payment by Receiver of $5,027. Complainants excepted; exceptions over-ruled and amount paid, p. 216 and 219.

Then follows the payment of several other similar bills.

March 9th, 1875.—The Missouri Car &c. Company filed a petition, p. 223, showing a lease of fifty cars and asking for the payment of $13,367.36, &c.

March 2d, 1875.—Seven days before the filing of the petition, the amount $13,367.36 was ordered by Dillon, *Judge*, at Chambers, *exparte* to be paid, p. 225. It was paid.

March 9th, 1875.—The Mowry Car, &c. Company, filed a similar petition showing a lease of 100 box-cars ($860 each,) asking for the payment of a balance, due for rent of 47,031.74 with interest, p. 225.

Oct. 21st, 1875.—Apparently without notice, hearing, reference or consent, the Court made an order directing the payment to the Mowry Car, &c. Co. of $47,031.74 as principal, p. 225 and 228.

March 9, 1875.—John S. Newbery, *et. al.*, filed a similar petition, as Trustees of the Missouri Car, &c. Company, for rental of 200 cars bought from the R. R. Co., p. 229. Case. p. 995.

Oct. 21st, 1875.—The Court entered an order in favor of said claim, apparently by consent of parties, p. 233, for the payment of $125,736 with interest thereon and gave the same *precedence and priority* over the claims of the mortgage bondholders, p. 234.

May 8th, 1875.—Haskell & Barker Car, &c. Company filed a similar claim for a balance of $6,571.18, and interest at 10 per cent. for 2 passenger and 2 baggage cars; they had previously been paid $4,993, p. 248 and 250.

Oct. 21st, 1875.—Apparently without notice, reference or hearing, the Court ordered the amount claimed to be paid, p. 252.

Oct. 11th, 1875.—Special Master Fisher reported the amount due to the complainants on 1st mortgage, p. 281. Principal $3,700.000, interest in gold coin $923,335. Total, $4,623,335, with interest from Oct. 15th, 1875, to be added. The same report shows to be due to the complainants on second mortgage principal and interest, $1,136,246.86 in gold coin, interest to be added; due to the complainants on the third mortgage principal and interest $530,740.

Oct. 20th, 1875.—Application was made to remove D. N. Pickering as Receiver, p. 1088.

Jan. 17, 1876.—The Court appointed J. B. Grinnell, Receiver in place of D. N. Pickering, p. 1144. Court gave certain verbal instructions to Grinnell regarding his duties, p. 1145

Oct. 14th, 1875.—Complainants' counsel filed a paper in Court showing a dissent from the terms of the proposed decree, and asking the advice of the Court thereon, p. 1195.

Oct. 22d, 1875.—On Friday (the unlucky day) the Court entered its decree of foreclosure and sale, p. 1196, which is set out in full in a subsequent part of this brief.

Dec. 16th, 1875.—The judge communicates with the complainant by telegram without the knowledge of counsel and receives the answers set forth on p. 1199.

On same day complainant shows the decree is not by consent by filing a petition to appeal, for certain bondholders, p. 1200.

Dec. 24th, 1875.—The complainant filed, in Court, copy of letter, dated Dec. 8th, 1875, from Appellants, requesting complainant to take an appeal, p. 1200.

And on the same day, filed a bond on Appeal, p. 1201. On the same day, Dec. 24th, 1875, the judge filed his reasons for not allowing an appeal, under date of Dec. 16th, 1875, p. 1202.

January 11th, 1875.—The appellants filed, in Court, their petition for liberty to intervene and to take an appeal, p. 1203.

Jan. 13th, 1875.—Appellants, it then being of the October Term 1875, moved the Court to set aside the decree of Oct. 22d, 1875, p. 1204, which was heard by the Court and motion denied, p. 1205.

Under date printed Jan. 4th, 1875, p. 1205, it being evidently a misprint it should be January 14th, 1875. The opinion of the Court is given refusing to set aside decree of Oct. 22d, 1875.

And on the same day the Court granted the appellants a qualified appeal, but accompanied it with onerous conditions too great to be submitted to, p. 1206.

See statement and attempted justification of Judges Dillon and Love, p. 1205 and 1208.

Feb. 21st, 1875.—The appellants filed their petition for an appeal, which had been previously presented to the presiding justice of that Circuit, Hon. Sam. F. Miller, and allowed by him, p. 1209. Citation and bond, p. 1209 and 1220. This appeal is pending as No. 175. It was before this court on certain motions to dismiss, appeal and vacate *supersedeas*, the result of which is found in 3 Otto, p. 412. (93 U. S. Supreme Court Reports.) The *supersedeas* was vacated, and the court below proceeded to sell the mortgaged premises, July 18th, 1877. But one bid was made, which was by complainants,

p. 1 and 2 of No. 570; the bid was in writing and is found on p. 6.

August 25th, 1878.—The appellants filed exceptions to the Master's report of sale, found on p. 12 of No. 570.

August 29th, 1878.—Complainants moved to confirm sale, p. 9. Appellants in addition to exceptions filed, entered a protest against executing decree, p. 11.

August 31st, 1878.—Exceptions of appellants over-ruled and sale confirmed, p. 26 of No. 570.

Same day appellants requested their trustee, the complainants to appeal, which request was refused, p. 24 and 25 of No. 570.

Same day Court entered an order confirming sale, p. 27; and doing much more—see order.

August 31st, 1878.—The appellants were allowed an appeal in open Court, and after a hearing, but a *supersedeas* was denied, p. 29. Bond on appeal was given as required by the Court, p. 29 and 30.

Sept. 22d, 1875.—Appellants applied to Mr. Justice Hunt for an allowance of *supersedeas*, and tendered a good and sufficient bond. The justice allowed it, p. 30 and 32.

This appeal is No. 570 upon the docket of this Court.

Motion was made to dismiss appeal and vacate *supersedeas*, which motions were denied.

See 96 U. S. Reports, 712, *Sage, et. al., vs. Railroad.*

No. 175 is the first appeal.
No. 570 is the second appeal.

At the present term of this Court, it has made an order directing No. 570 to be heard when 175 is reached and heard.

The appellants—interveners in the Court below—feeling agrieved, appeal to this Court for redress, and ask that the decree made October 22d, 1875, the various orders giving

John S. Newberry & Co.	$125,736.00	and int.
Isaac M. Cate, *et. al.*,	44,769.78	"
Mowery Car Co.,	47,031.74	"
Haskel & Barker Car Co.,	6,571.18	"
	$224,108.70	and int.

and making the same a lien upon the mortgaged premises or upon its income prior and superior to that of the first mortgage bondholders, and that the order of August 31st, 1877, confirming the sale of the mortgaged premises, be reversed and set aside with directions to enter such decree and orders relating thereto, as this Court thinks to equity appertains, or that this Court will itself enter the proper decree in the premises.

The appellants herewith submit a form of decree at the end of this brief, and respectfully ask this Court to enter the same.

ASSIGNMENT OF ERRORS.

1st.—The Circuit Court attempted to force different and inconsistent duties and trusts upon the trustee of the bondholders from what the parties had themselves established by contract under seal, viz.: the mortgage deed.

2d.—The *fourth* paragraph or head of the decree is erroneous and should be reversed, except so much of it as appoints a Master to make the sale, and gives instruction to the Master what and how to do,

3d.—The *fifth* paragraph or head of the decree is erroneous, and should be modified substantially as below shown in this brief.

4th.—The *sixth* paragraph or head of the decree is erroneous, in so far as it discriminates in the terms of purchase in favor of the complainant; the sale should be open to all persons upon the same terms.

5th.—The *seventh* and *eighth* paragraphs are erroneous and should be omitted.

6th.—The *ninth* paragraph is erroneous, and should be so modified as to state the exact amounts due upon the class of claims thus named, so that any proposed purchaser would know the approximate amount that he would have to pay or assume.

7th.—The Circuit Court erred in over-ruling the exception filed by the appellants to the Master's report of sale.

8th.—The Circuit Court erred in directing and declaring all debts contracted by the receiver to be "a just and permanent lien upon said property and all additions thereto to all other liens," in this, that the said declaration and direction, in effect made certain contract debts of the defendant railroad company, which may have been erroneously assumed by the receiver prior in lien to the first mortgage bonds of the appellants and others which had been issued and secured by mortgage long anterior to the time said debts were contracted, viz., contracts by lease and otherwise with John S. Newberry, *et. al.* for $125,736.00 and int.

Isaac M. Cate, *et. al.*	"	44,769.78	"
Mowery Car Co.	"	47,031.74	"
Haskell & Barker Car Co.	"	6,571.18	"
		$224,108.70	

and declaring that said Circuit Court would enforce the same without any other action thereon, &c.

9th.—The Circuit Court erred in ordering and decreeing certain undefined alleged debts, said to be provided for in paragraph *eight*, of the decree of sale, to be liens upon the premises and prohibiting the beneficiaries of the purchase from having or enjoying any benefits of the property until said indefinite and undetermined debts are satisfied and discharged.

10th.—The decree is erroneous, illegal, incongruous and contradictory in the first paragraph thereof the right of redemption is barred as to the defendant, the Railroad Company and the 2d and 3d mortgage bondholders and the judgment creditors; while in the *seventh* paragraph thereof, time is given to the 2d and 3d mortgage bondholders, the general creditors and stockholders of defendant Company, within which they may redeem—thus apparently denying the right of redemption to the Railway Company and to the judgment creditors.

11th.—The decree made by the Court is not authorized by the prayer in the bill of complaint, or is it reponsive thereto.

12th.—The appellants desire to avail themselves of each and all other of the errors manifest upon the record in both appeals.

The exceptions taken by the appellants to the order confirming the sale of the railroad are to be found at p. 12, of No. 570.

The order confirming the sale is found on page 27 of No. 570.

ARGUMENT.

I.—The original bill of complaint brought by Alexander, a bondholder, was in behalf and for all the bondholders, (p. 21.) The Farmers' Loan and Trust Company in its complaint avers the suit to be brought in behalf of the bondholders, secured by said mortgage, (p. 42.)

Hence appellants were originally made parties to the suit.

The Circuit Court allowed appellants to appear as intervenors in all subsequent proceedings, by its order of January 14th, 1876, (p. 1,206,) and from that time forward heard and treated appellants as parties to the suit. It allowed the appellants to file and argue exceptions to Master's Report, (p. 12 of No. 570.)

It received and allowed appellants to file a petition for an appeal in which it is recited that the appellants intervene by liberty of the Court, (p. 25 of No. 570.)

The Circuit Court exercised its discretion and heard the appellants, thus giving them the right to appeal.

Cutting, *ex parte*, 4th Otto, 14.
Jordan, " " " " 248.

II.—The appellants had and have the right to become parties to the suit, without limitation or restriction, because they had proved an interest in the fund in the hands of the Court, and having the right to become parties and having

been heard thereon, they had the right to take an appeal if aggrieved by the action of the Court.

4th Otto, 467, Hinckly vs. Gilman, &c., R. R.

This is a proceeding *in rem*, the bondholders are treated as claimants in the decree appealed from.

2d Daniel's, Chancery Pr., 1,460.

The decree is not only a decree confirming the sale, but one of distribution; it directs the purchaser to act for the appellants among others, and to distribute the purchase to the appellants and other bondholders, p. 1,198 and 27 of No. 570.

The Circuit Court ordered the distribution of a fund in its possession of $5,192,390, in which fund the record shows the appellants to be interested to the amount of over $200,000. The appellants claim to be aggrieved by the order of distribution of that fund. They appear in Court, set forth their claims, and specifically make themselves parties to the suit by filing exceptions to the proceedings; are heard, and claim redress for their grievances.

1 Wallace, 655; Blossom v. R. R. C.
4th Otto, 248, Jordan *ex parte*.

A receiver may appeal, though not a party to the suit.

4 Otto, 467, Hinckly vs. Gilman, &c., R. R. Co.

The Circuit Court, having conceded the right of the appellants to be heard in that Court, this of itself entitles them to appeal if aggrieved. If the appellants had a legal claim to the fund, they have a right to contest the claims of others conflicting with their rights; the making a decree does not end the right of intervention; that survives the decree and involves the right of appeal.

2 Daniels, Ch. Pr., 1,460.
6 Howard, 201, Forgay vs. Conrad.
4 Otto, 248, Jordan *ex parte*.

In 24 Howard, 186, Kellogg vs. Forsyth, a landlord was allowed to appeal where the suit was against the tenant.

For the first time in the history of the case in the Circuit Court, that Court by its decree of August 31st, 1877, directs the distribution of a portion of the trust property in its hands for administration. The Court treated the fund then as one for distribution, and then fixed some amounts which should be paid prior to others. It then first exercised its judicial authority—not arbitrary or discretionary authority—but judicial authority. In doing so it injured the appellants.

11 Wall, 267, McVeigh vs. U. S.
4 Otto, 248, Jordan *ex parte*.

This Court will suspend its own rules to promote or to do justice. 20 Howard, 254, U. S. vs. Breitling. In that case the promotion of justice was to retain an appeal, supposed to have been deficient in the bill of exceptions. The ample power given to this Court in Sec. 701 U. S. Rev. Statutes were given that they might have the power to do, and do justice; that is, hear the grievances of parties and determine the same.

The duties and interests of the Trustee who may have acted for the appellant, terminated and came to an end when the decree of foreclosure and sale was obtained. The Trustee had no other authority to act for the bondholders than such as is conferred upon it by the deed of trust (see opinion of Dillon, *Judge*, page 28 of No. 570.) In this case there is a provision in the deed of trust, authorizing the Trustee under certain circumstances to buy the mortgaged premises; but there can be no pretense that in this respect the decree follows the deed of trust. Whatever power the Trustee had exercised after decree entered was conferred by the Court, and not by the deed of trust or agreement of the parties. Hence at that point in the litigation the bondholders themselves—the appellants—became parties in interest. Th

mortgage provides that in the event of a sale, "and the holders of a majority of the then outstanding bonds secured by this mortgage, shall in writing request the Trustees; it is authorized to purchase the premises enclosed herein, *for the use and benefit of the holders of the then outstanding bonds secured by this mortgage.* No authority whatever is given the Trustee or any one else to purchase the premises for the use and benefit of second and third mortgage bondholders or creditors, other than first mortgage bondholders or for stockholders. The authority given is confined wholly to the use and benefit of the first mortgage bondholders.

It was extra judicial and beyond the power of the Court to take cognizance of plans of re organization.

50 Vt. p. 593, Vt. Can. R. R. *vs.* Vt. Cent. R. R.

III.—The decree appealed from is not and does not purport to be a decree by consent. The suit is a bondholders suit; some of the bondholders, viz., the appellants, dissented from the decree; the dissent was filed in Court and is found on page 1,195 of record.

If it is said that counsel of complainants below assented to the decree appealed from, the reply is that the record does not sustain the assertion; a statement of facts made and filed by the Judges several days after the issue and service of the writ of error in the case, is a nullity.

7 Wall, 564, Generes *vs.* Benneman.
8 Wall, 376, Avendoro *vs.* Gay.

If the statement of the Circuit Judges page 1,208, can be construed into an assent to the decree, we reply that such assent if given, which it does not appear to have been, was unauthorized.

The solicitor of the complainant could have no more authority than the complainant itself.

The complainant had no authority not conferred upon it by the deed of trust. That deed of trust in no way manner or form, authorized such a decree as was entered by the Circuit Court—or did the complaint or any pleading in the cause. See complaint, pp. 21 and 42.

Deed of trust attached to both complaints as Exhibit B, pp. 33 and 55.

IV.—There is no dispute or controversy as to the validity or amount of debt, or as to what property is pledged for its security.

All the questions arising upon the record, relate to the manner and form by which the creditor—*i. e.*, the bondholder—shall realize the debt due to him out of the property pledged to secure its payment.

A statement of the errors in the decree is a sufficient argument of the case.

With the indulgence of the Court we will briefly add a few words more:

V.—By the 4th paragraph of the decree, the Circuit Court attempts to make a new and entirely different agreement for the bondholders from that which they had themselves made in the deed of trust.

The Court finds that under certain circumstances, if the Trustee shall be requested, in writing, by a majority of the first mortgage bondholders so to do, the Trustee may buy the premises for the first mortgage bondholders, and then proceeds—in the 5th paragraph of the decree,—without finding that the condition precedent has been complied with, viz., the

request, *in writing*, of a majority *of bondholders*—to direct the Trustee to buy the mortgaged premises in trust for the holders of other mortgage bonds, viz., *second and third mortgages, creditors and stockholders* of the defendant railroad company; and then, as if they were afraid that such a harmless decree had possibly foreclosed somebody (in the 8th paragraph), the decree in substance says, that no one having a judgment or other lien upon the property, or any one claiming *rights* or equities in or to the mortgaged premises by virtue of contracts, &c., shall be affected by the decree.

Why call this a decree of foreclosure? Who is foreclosed? Not the debtors, for the only one who can, under the peculiar form of this decree (see 6th paragraph), buy the premises, viz., the Trustee, is required to buy in trust for the stockholders who are the debtors. It is as if it read, "whereas the bondholders and their Trustee have agreed to do one thing, therefore, the Trustee shall be required to do an entirely different thing; and whereas the bondholders have agreed, under a certain contingency, to associate themselves as the owners of the mortgaged premises, therefore, they shall take into co-partnership with them their former debtors, and *all its creditors*."

VI.—The 9th paragraph of the decree should have required the Master to have reported, *before the sale*, the approximate amount of *costs, fees and expenses*, which the purchaser would be required to pay, otherwise no purchaser could bid intelligently, or know, within a large amount, what sum he would be required to pay. It should, properly speaking, be set out in the decree itself, but if not there found, it should be definitely fixed, so that any proposed purchaser could ascertain the amount by looking at the records of the case in the clerk's office.

VII.—The decree is not responsive to any pleading in the case; no such questions were submitted to the Court as the decree passes upon. No such relief as was given by the Court was either asked for, or intimated as being desired by the complaint.

3 Wall, 764, Minnesota Co. *vs.* Chamberlain.
7 Wheat., 522, Crockett *vs.* Lee.
10 " 181, Carneal *vs.* Banks.

A party cannot have a greater relief than he asks in his petition.

Code of Iowa, Sec. 2,855.
5 Iowa, 503, Havens *vs.* Baldwin.
10 do. 23, Stadler *vs.* Parmlee.

The bill of complaint asks to have the debt established, and in default of the debtor paying it, that its property shall be sold for the purpose of paying the debt.

The decree, as entered, and so far as the record of the questions at issue shows, without any party asking for any such decree, orders a sale, and practically limits the purchaser to one person, the Trustee, and directs him to buy it in trust for almost everybody except the creditor seeking to collect his debt, and to form a company organized upon principles to be hereafter approved by the Circuit Court, (*vide end of 5th paragraph*) compelling the creditor to go into a copartnership for transporting persons and property, with a great many other individuals and interest, willing or unwilling.

Plans of reorganization do not fall within the cognizance of the Court.

50 Vt., p. 593. Vt. Canda R. R. vs. Vt. Central R. R.

VIII.—The appellants have not heretofore, in this brief, quoted many authorities; they have assumed that this high

Court were quite familiar with the elementary principles of equity, and with its own administration of these principles.

With the indulgence of the Court they will now quote several authorities not referred to in the books, sustaining, as we think, our views of the decree in this case.

Judge Dillon says the decree was not entered upon the independent consideration of the Court of the rights and equities of the various parties, thus disclaiming any judicial paternity for the decree.—See printed record, p. 1,207.

Hon. James Grant, the solicitor for the trustee, and upon whose motion the decree should have been entered, if it was the decree he asked for, and a consent decree, writes to the appellants under date of November 7, 1875: "My judgment is, that the whole decree is a *fraud and a sham* to keep the present managers in power. I told Starr and Latrobe, who are lawyers, that I thought so; but Latrobe said, I have interested friends, and I must stick by them.'"

Mr. Richard Lewis Ashurst and J. H. B. Latrobe, in writing under date of January 15, 1875, inform the trustee, that, "the power of purchase contained in the mortgage, by which the title is to vest in a new company, etc., and the bondholders are, under certain contingencies, allowed only to claim their proportionate interest in said company, *applies only to a sale made for the benefit of first mortgage bondholders exclusively; under this power the purchase must be for them alone.*"

IX.—The decree, p. 1,198, directed the sale of the premises to be advertised in "*The Financier*," New York. There was no such newspaper. The Master reports that he advertised it in "*The Public*," "published in the city of New York. That

the publication of said notice required by said decree in *The Financier*, by order of this (the Circuit Court,) dated Jan. 8th, 1877, was changed to *The Public*, of New York," p. 1 and 2 of No. 570.

This case was removed from the Circuit Court by appeal to this Court, February 21, 1876.

The order changing the decree as to where the sale should be advertised, is found p. 1, No. 570, under date of June 8th, 1877. It was dated on the 8th of January, and entered on the 8th of June, 1877. It was an *ex parte* order without notice to, or by the consent of any party to the suit, and either *ante* dated, or else witheld from the record from January 8th to June 8th.

We claim and ask this Court to so adjudge that it is not competent for the Circuit Court to change the record in any form whatever, no matter how trivial the change, after the term has ended at which the decree was entered, and after the case has been removed from that Court by appeal to this Court.

3d Wheat., 591, Cameron vs. McRoberts.
18 How., 507, McMicken vs. Perrin.
6 How., 31, Bank vs. Moss.

PREFERRED DEBTS.

The appeal in this case brings up all questions which have been decided prejudicial to the appellants.

13 How., 150; Buckingham *vs.* McLean.

In this case, so far as the debts preferred to mortgage debts, now unpaid, are disclosed in the record: they amount to about the sum of $224,108.70, with interest to be added from October 21st, 1875.

The history of the principal preferred debt—John S. Newberry, *et al*, $125,736, is as follows:

In June, 1872, under the terms of a written contract with the defendant R. R. Co., the Missouri Car Co. placed upon the railroad fifty box cars at $825 per car, and reserved a vender's lien or title to said cars; the sale came to $41,250; the Car Co. was paid by the R. R. Co., $27,872, and claimed, March 2d, 1875, $13,367 to be still due to them from the Railroad Company (p. 223-4); this debt has since been paid in full.

The same parties, by written contract of September 1, 1873, sold to the Railroad Company in the same manner, one hundred coal cars and one hundred box cars, p. 229. On the 21st day of October, 1875, Receiver Pickering made an agreement with the Car Co., (p. 231.) And on the same day a judgment was entered upon said last-named agreement, p. 233,) by which the Receiver was ordered to pay for said two hundred cars the sum of $125,736. The Court determined that said agreement was "made with the consent and approbation of the different parties to these proceedings," (p. 234.) And the said sum of $125,736, with the interest thereon was adjudged to be a claim having precedence and priority over the claims of the plaintiffs (the bondholders) in the suit, and over the various parties represented by said plaintiffs in its capacity and relation as trustee, p. 234.

The record shows no such facts as are recited in the order of 26th Oct., 1875. The only party to the contract, or so far

as known, the only person who had knowledge of it, was Pickering, the Receiver.

No counsel or solicitor of the Court was responsible for it or did any counsel employed by complainant know of it. It was entered quietly the day or the night before the entry of the main decree, without attracting attention, and it is not believed by counsel that it was entered in open Court.

The history of the preferred debt to Isaac M. Cate and others, p. 85, is substantially as follows:

The debt was created in favor of Cate, Abbott, Kensett and John S. Gilman, all of whom were directors in the defendant railroad company. Cate was its President. It was created for the purchase of four locomotives at $59,065, in Masachusetts—say $14,700 each—(locomotives of that class are now worth about 7,000 each). The locomotives were leased by the purchasers to the railroad company. Copy of lease is found on p. 88. Rent agreed to be paid was $11,200 per annum equal to about 25 per cent. per annum on their agreed cost; the railroad company were to keep them in good repair, and to be returned in *perfect order and condition*. They were paid $6,000 upon the purchase. The Court found, Oct. 21, 1875, the sum of $44,769.78 to be due Cate, *et al.*, with interest to be added from April 1, 1875, and ordered the same to be paid, p. 89.

The merits of this class of receivers debts has been so recently and fully argued before this Court by Messrs Ashabel Green and H. Crawford, Jr., that we do not feel ourselves to be justified in going over the same argument again; but content ourselves with referring the Court to the briefs submitted by these learned gentlemen, and to the two leading cases upon the subject, viz:

50 Vt. Reports, 500, 569. Vt. & Canada R. R. vs Vt. & Central R. R.

12 Kentucky Reports, 608. Douglass vs. Cline, dissenting opinion of Coffer, *J.*, p. 632.

And to a summary of a brief prepared by the undersigned in the case of Jordan vs. Stevens, No. 556 of the present term of this Court.

1st.—In the case now submitted, it will be observed that in each case, after the receiver was appointed, he as receiver, asked the Court to authorize the issue of debt complained of by the appellants, if any one asked it, and the orders were made on the request of the receiver without notice to the complainants, or to their *cestui que trusts*.

2d.—The duty of the Circuit Court was to take the custody of the defendants' railroad under its control, and to operate the same. When it went beyond that simple duty, it went beyond its jurisdiction and beyond the law. It was no part of the duty of its officer, the receiver, to go into any speculations, or to set up any hypothesis, such as if the receiver should buy more equipments or lease railroads, he, the Receiver, could make more money for the bondholders.

3d.—For the Circuit Court to listen to the petition of its Receiver in this respect, was irregular, to use a mild term, and in the result practically destructive to the property of the mortgagees. The Court has in this case already paid several hundred thousand dollars of Receivers debts. It has paid the present claimants more than the same property would cost if bought now at the present market prices—it is claimed that it still owes the claimants a sum which would much more than buy the leased equipment new. Instance the John S. Newbery case—it is claimed there is due to Newbery for 100 box cars and 100 gondola cars the sum of $125,736 with interest, say in all $154,000. Some considerable payments have already been made to them—100 box cars, all new are now worth about $350 each, say $35,000, and 100 gondola cars about $250 each, say $25,000, making the total present value of *new* cars about $70,000.

The parties in interest, and not the officers of the Court should have asked for relief.

A Court of Equity acts in the first instance upon the person and not the property of the litigants therein, hence, before issuing its mandate or letter of authority to contract debts, it should have cited in and heard the parties in interest and first ordered them to perform the duty enjoined, or the Court would impose a penalty and direct its officer, *i. e.*, its Receiver to raise the money required upon the property under the control of the Court.

1 Spence Equity, 389, 391.

4th.—Certain parties furnished to the Debtor Railroad Company certain specific personal property, and, knowing of the mortgage in favor of the appellants, endeavored and did secure themselves by taking or securing a vendor's lien upon the property sold; and to make it plain and unmistakable that they had such a lien, they entered into a written contract confirming the vendor's lien. The contracts entered into are called vendor's liens, but they are really mortgage leases, (see pp.

The parties in interest made their own contract with their debtor, and took such security for its performance as they agreed upon—the appellants were not parties thereto. *Courts Declare the Law and do not make Contracts for the Parties.*

5th.—In this case the Circuit Court has, in substance, said: "You, the sellers, made a bad bargain with your debtor; come into my Court and I will make a better one for you. The appellants think they have got a first mortgage—that may be so on paper—but this Court will disregard it and give you a lien upon the whole 190 miles of railroad prior to the first mortgage of the appellants, in place of your limited mortgage lease upon the property you sold." So, by the stroke of a pen, on the application of an officer of the Court, without notice or argument, a lien is placed upon this property prior

to the first mortgage, by the Court simply making a new contract for the parties other than the appellants.

We claim that, if they had a vendor's lien or a lease mortgage—and we admit they had—they should have asked the aid of a Court of Equity to foreclose their liens, and that it was improper to ask the Court to buy them out, and equally improper for the Court to buy out litigants under one contract, and make another contract for them.

6th.—It may be said that the Court has had the use of the property, and therefore, should pay for it. This we might admit, and still deny the right of the Court to buy it. Whatever claims this class of Receivers' debt holders may have, they should bring them into Court in a proper way and get proper and authorized redress.

If it be said that the Receiver was the agent of the appellants, this we deny. But supposing he were such agent; his agency was limited and defined by the terms of the trust deed attached to the complaint, and he could have no possible authority beyond that deed—he could have no authority to transport persons or property beyond the limits of the mortgaged premises, or to change the contracts of the Debtor Railroad Companies so as to give other parties priority in lien over the bondholders.

7th.—The duty of the Court, upon a motion for a Receiver, is merely to protect the property in the meantime, for the benefit of those persons to whom the Court, at the hearing of the case, when it will have before it all the evidence and materials necessary for a determination, shall think it properly belongs.

15 Beav., 42, Blakely *v.* Dufaur.

53 Ala. Repts. 237, Myers *v.* Johnson, see p. 335.

50 Vt. Central R. R., and Vt. & Canada R. R. 500, see page 569 and following.

1 Wood, Circuit Court, 331, see 351 Cowdrey *v.* R. R. Associate Justice Bradley.

12 Kentucky Reps., 608 Douglass *v.* Cline dissenting opinion of Coffer, *J.*, (p. 632.)

THE RIGHT OF REDEMPTION.

XI.—If there is any question in this case about the right of redemption, we desire the Court to establish the law in that respect.

The property is wholly in the State of Iowa. The laws of Iowa provide—Sec. 3,102—"The defendant may redeem real property at any time within one year from the day of sale as herein provided, and will in the mean time be entitled to the possession of the property."

Vide 96 U. S., p. 627. Brine vs. Insurance Co.
The U. S. Circuit Court, 7th Judicial District Mr. Justice Harland presiding, held that a similar law in Illinois did not apply to railroads.
Turner, *et al.*, vs. I. B. & W. Ry. Co., *et al.*, Chicago Tribune Report, Oct. 8th, 1878.

The decree appealed from takes both sides of the question; in the first paragraph of the decree the right of redemption is barred as to the defendant—railroad company—and the 2d and 3d mortgage bondholders, and the judgment creditors. In the seventh paragraph of the decree, one year's time, within which the premises may be redeemed, is given to the 2d and 3d mortgage bondholders, the general creditors and stockholders of defendant company, thus barring the right of redemption to the railroad company itself and to its judgment creditors.

XII.—The decree below should be reversed, and a decree entered by this Court as provided by Sec. 701, of Revised Statutes, U. S., or else remand the case to the Circuit Court, with instructions to enter a decree in accordance with the opinion of this Court.

N. A. COWDREY,

Solicitor for the Appellants.

SUPREME COURT,

OF THE UNITED STATES.

RUSSELL SAGE, *et. al.*, *Appellants.*	
vs.	*October Term*, 1878. Nos. 175 and 570.
THE CENTRAL RAILROAD OF IOWA. *Appellees.*	

DECREE PROPOSED BY APPELLANTS.

This cause came on to be heard at this term upon the transcript of the record from the Circuit Court of the United States, for the district of Iowa, and the Court having heard all the parties to the cause by their respective counsel of record, it is now ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court from which this appeal is taken, be, and the same is hereby reversed and set aside with costs to the appellants.

And upon the motion of H. B. Turner, Esq., solicitor for the Farmers' Loan and Trust Company, one of the appellees, and upon the consent of N. A. Cowdrey, Esq., solicitor of the appellants, it is ordered, adjudged and decreed:

1st.—That the said Central Railway Company of Iowa, one of the defendants in this case, is indebted to the Farmers' Loan and Trust Company, Trustees, in the sum of $3,700,000 gold coin, principal, with arrears of interest to January 15th, 1879, of $1,554,000 in gold coin, in the aggregate amounting to the sum of $5,254,000 in gold coin, due on the 15th day of January, 1879, the payment of which indebtedness is secured by the mortgage set forth in the bill of complaint, dated July 15th, 1869; that said mortgage is a first and paramount mortgage lien upon

the premises described therein, viz: "The entire corporate property of the said Central Railroad Company of Iowa, and all its franchises and privileges, constructed (at the time of making said mortgage) or to be thereafter constructed, then held and acquired, or to be thereafter constructed and acquired, extending from a point in Davis County, on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa, in Mahaska County, a distance of about sixty miles along the line formerly owned by said Iowa Central Railroad Company; and thence northerly to Marshalltown, and thence along and including the railroad built by the Iowa River Railway Company to Ackley, in Hardin County; and thence northerly to the north line of the State of Iowa, at such point as shall be hereafter determined, including all the rights and franchises of the said Iowa Central Railroad Company, and of the said Iowa River Railway Company; including also along the entire line all the right of way acquired by purchase or condemnation, road-bed finished and in process of construction, with all material collected for construction or operative purposes, depot grounds, gravel pits, quarries and real-estate, station-houses, water-tanks, repair and machine-shops, turn-tables, coal-houses and sheds, and all things of every name and nature belonging to said Iowa Central Railroad Company, and pertaining to said railroad; also all machinery, locomotives and rolling stock, and all tools and supplies heretofore acquired, or which may hereafter be acquired by said Central Railroad Company of Iowa; also the net income of said Railroad Company."

2d.—That the amount due April 15th, 1879, to the said Farmer's Loan and Trust Company, Trustees of the Second Mortgage described in the complaint, is the sum of $925,000, of gold coin, of principal, and the sum of $388,500, gold coin, of interest, making the aggregate debt due April 15th, 1879, secured by the Second Mortgage, the sum of $1,313,500 gold coin; that the payment

of said indebtedness is secured by a Second Mortgage upon the premises above described, dated April 15th, 1871.

3d—That the amount due May 15th, 1879, to the said Farmer's Loan and Trust Company, Trustee of the Third Mortgage described in the complaint is the sum of $420,000 gold, of principal, and $241,487 gold, interest, making in the aggregate the sum of $772,227, gold; that payment of said indebtedness is secured by a Third Mortgage upon the premises above described, dated May 15th, 1872.

4th.—That the amount due by the Receiver appointed by said Circuit Court for the operating expenses of the Railroad at this time, shall be reported by the Master and filed in the office of the Clerk of the Circuit Court at Des Moines, before the day of sale, and the amount so found shall be publicly announced by the Master at and just previous to the sale, which amount will be changed, and may be fully paid before the sale herein ordered, by the application of the net earnings of the Railroad to the payment of said operating expenses.

5th.—That there is or was due from the Railroad Company, the amount of certain judgments for injuries to persons and property, particularly described in the Special Master's Report, the sum of $13,962.33, which are a lien upon said mortgaged premises, prior to all mortgages, but from some of which appeals have been taken, and they are liable to be reduced by reversing the judgments appealed from, and by payment of such of the judgments as are valid from the net earnings of the Railroad while in the hands of the Receiver.

6th.—Wherefore, it is now ordered, adjudged and decreed, that unless the defendant, the Central Railroad Company of Iowa, or some one or more of the other defendants in this cause, shall pay to the complainant,

within sixty days from the date of the entry of this decree, the sum of $5,254,000, in gold coin, with interest thereon from January 15th, 1879, at the rate of 7 per cent. per annum, as and for the mortgage debt above described, and also the cost and expenses of this suit to be taxed, then and thereupon the defendants, each and every of them, shall be absolutely barred, foreclosed and precluded from all right, claim, or equity of redemption in or to any part or the whole of the above described premises.

7th.—That in default of the payment last above-named it is further ordered, adjudged and decreed, that the mortgaged premises hereinbefore described be sold at public auction at the county court house at the city of Marshalltown, Iowa, by Lewis M. Fisher, who is hereby appointed a Special Master of this Court for that purpose. That the compensation of such Special Master be and is hereby fixed at the sum of $500, exclusive of his necessary cash disbursements for advertising and sale. The Special Master is hereby directed to give notice of such time and place of sale by advertising the same in the Des Moines, *State Register*, published at the city of Des Moines, and one newspaper published in Marshalltown, Iowa, for four successive weeks, commencing from the expiration of thirty days from the time of the entry of this decree.

That the mortgaged premises be sold as an entirety, and that any party to this suit may bid for and purchase the same. That the Master may adjourn and postpone said sale from time to time, at the written request of the plaintiff or of its solicitor or counsel, but he shall give reasonable notice of the time of sale.

8th.—It is ordered, adjudged and decreed, that the purchaser of the mortgaged premises, at said sale, shall take the same subject to the unpaid claims, if any there be, of the Receiver and of his employees, or others, for labor or supplies used in the operation of

the Railroad from the time of the entry of this decree to the time when said sale shall be confirmed by said Circuit Court; but the same shall not exceed in amount the sum of $50,000. All current earnings of the Railroad within that time shall be applied to the liquidation of said claims, and the surplus, if any, and any money in the hands of the Receiver, after paying current operating expenses and previous orders of this Court, shall be applied by the Receiver to the payment of the judgments or other liens against the Company which are a lien upon the property of the Railroad Company prior to the mortgages upon the premises. If any surplus remains after paying said liens, then the same shall be paid as directed by the Circuit Court of the United States for the Circuit of Iowa.

9th.—Any purchaser of the mortgaged premises may pay for the same as follows:

They shall pay into Court, in lawful money, the amount of money demands against the fund arising from the purchase of said mortgaged premises, necessary to defray the money demands against said fund, as hereinafter stated; and the remainder of the purchase money may be paid in the bonds or over due coupons issued under and secured by the First Mortgage above mentioned as being made July 15th, 1869, in such proportion to the par value of said bonds and over due coupons as the amount of such remainder of said bid bears to the amount of said debt above found to be, January 15th, 1879, $5,254,000 with the thereafter accruing interest.

10th.—It is further ordered, adjudged and decreed, that out of the cash payment to be made by the successful bidder or bidders at said sale, unless the same shall have been previously paid by or under orders of said Circuit Court, there shall be paid the following sums, the cost of this suit.

(*a*) The fees of the Special Master, for services heretofore rendered, the sum of $1,000; for services in executing this decree, the sum of $500.

(*b*) To the Farmers' Loan and Trust Company, plaintiff, for their services in this suit and for counsel and solicitors employed by them, the amount reported by the Master, viz., $18,000.

(*c*) The other proper costs of this suit to which the plaintiffs are entitled, to be taxed by the Clerk of the Circuit Court.

(*d*) All sums found to be properly due by the Receiver, or any other person acting under the authority of the Circuit Court, or by its orders, upon the persons entitled thereto presenting their claims to the Circuit Court, and obtaining an order, determining the proper amount thereof, subject to an appeal by any party interested therein.

(*e*) That the remainder of the proceeds of sale shall be distributed among the several holders of the mortgage bonds and valid coupons issued under the First Mortgage, made July 15th, 1869, and as further provided in the 13th paragraph of this decree.

11th.—It is further ordered, adjudged and decreed, that the Special Master making the sale, pursuant to this order, may require the purchaser to pay, at the time of sale, in money, the sum of $30,000, which may be paid by a certificate of deposit in the Farmers' Loan and Trust Company, of the City of New York, or in any National Bank, which is a Register of any Circuit or District Court of the United States; the certificate of deposit shall be payable to the order of the Special Master in this case, and the balance of the purchase money, both cash and bonds, shall be payable at the time the sale is confirmed by said Circuit Court.

12ht.—It is further ordered, adjudged and decreed, that the Special Master do make, execute, and deliver a proper and suitable deed or instrument of conveyance of said mortgaged premises to the highest bidder at said sale, and that he report to said Circuit Court, if in session, forthwith; if not in session, then to the next term thereof, when said Court will either approve and confirm said sale, or disapprove it, and order another sale of the mortgaged premises; and upon said sale being confirmed, the Receiver will be ordered to let the purchaser into possession of the premises sold.

13th.—It is further ordered, adjudged and decreed, that if there be any surplus of the proceeds of said sale, after satisfying the cost, allowances and charges as above set forth, and after paying the judgments which are prior liens upon the premises, and the amount due upon the first mortgage —viz., $5,254,000, with interest from January 15th, 1879, at 7 per cent. per annum; then and thereupon said surplus shall be applied to the satisfying of the said second mortgage indebtedness—viz., $1,313,000, after satisfying which, the balance, if any, shall be applied to the satisfying of said third mortgage indebtedness—viz., $772,227. If any balance remains after paying the above-named expenses, judgments and mortgages, the same shall be paid into said Circuit Court to abide the further order of said Court.

14th.—Any party to this suit may apply to said Circuit Court, at the foot of this decree, for further relief.

15th.—That cost be taxed by the clerk of this Court in favor of the appellants, which cost shall be a charge against the trust fund, and be paid out of the net earnings of the mortgaged premises, if any such there be, otherwise out of the proceeds of sale of said mortgaged premises.

ATTACHED TO APPELLANT'S BRIEF IN No. 175, OCT. TERM, 1878

DECREE APPEALED FROM, MADE OCT 22d, 1875.

IN THE U. S. CIRCUIT COURT,

FOR THE DISTRICT OF IOWA, OCTOBER TERM, 1875.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA.

No. 501.—*Equity.*

This cause coming on to be heard upon the pleadings, the proofs taken, and the report of the Master, Lewis M. Fisher, heretofore filed in said cause, and the several parties in interest appearing by counsel, the cause was submitted and taken under advisement by the Court, and now said Court finds, orders and decrees:

First.—That the first mortgage in the bill set forth was duly executed and delivered to complainant, as Trustee for the owners of the bonds therein described, on the 15th day of July, 1869, for the purpose of securing the payment, principal and interest, of the certain bonds of said Central Railroad Company of Iowa, amounting in the aggregate to the total sum of 3,700,000.

That default in payment of the interest accruing on said bonds has been made, there being now past due the sum of $623,334.99, up to October 15th, 1875, which amount thus

due, together with the principal sum of $3,700,000, forms the first and paramount mortgage now upon the property in the bill described. That default has been made in the performance of the conditions of said mortgage, though the non-payment of said interest as aforesaid, entitling complainants to a decree of foreclosure, and the Court finds there is due on said mortgage for principal, and interest, the sum of $4,623,334.99, in gold, on the 15th of October, 1875, which now it is ordered that defendant, the Central Railroad Company of Iowa, shall pay in ten days from this date, with seven per cent. interest, in gold, from the 15th of October, 1875; and if said defendant shall not pay the same, then the mortgagees of the second and third mortgage and said judgment creditors, or any of them in the order of their respective liens, shall pay the same, and upon such payment, with costs, the said plaintiffs shall satisfy and discharge said mortgage debt, interest and costs, and in default of said payment of any of said parties, their equity of redemption in said premises is forever barred and foreclosed.

Second.—That the second mortgage in the bill described was duly executed and delivered to complainant, as Trustee for the owners of the bonds therein described, on the 15th day April, 1871, for the purpose of securing the payment, principal and interest, of the certain bonds of respondent, in said mortgage described, amounting in the aggregate to the total sum of $925,000; that there is now justly owing to the holders of said bonds the sum of $1,136,246.86, including principal and unpaid interest up to October 15th, 1875.

That the said Second Mortgage, and the bonds secured thereby, are a lien upon the property of respondent in said bill described, dating from the said 15th day of April, 1871, being next in priority to the lien of said First Mortgage herein before described. That said respondent has made default in payment of the interest coming due upon said several bonds secured by said mortgage.

Third.—That the Third Mortgage in the bill described was executed, and delivered by respondent to the complainant as

Trustee, on the 15th day of May, 1872, for the purpose of securing payment of certain Bonds in said mortgage described

That there is now outstanding $420,000 of the Bonds secured by said Third Mortgage.

Fourth.—The Court further finds, that with the view to prevent a sacrifice of the mortgaged property by a forced sale, in case of default, it was expressly agreed and stipulated in said First Mortgage or Trust Deed, that in case of any judicial foreclosure sale of the mortgaged property, under decree of Court upon request of a majority of the bondholders the said Trustee should purchase the premises in the mortgage described for the use and benefit of the bondholders, and that upon such purchase, the title of said property should vest in said Trustee, and that no bondholder should have any claim to the premises or to the proceeds thereof except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed and organized upon such terms, conditions and limitations, and in such manner as the holders of a majority of said outstanding First Mortgage Bonds secured by said mortgage should in writing request or direct.

That for the purpose of carrying out these promises in said mortgage contained, and in view of the fact found by the Master and confirmed by the Court, that the mortgage property will not sell in cash for near enough to pay the amount due, thereon; and that the several parties in interest, including the First, Second and Third Mortgage bondholders, general creditors and stockholders in said Central Railroad Company of Iowa, have united in asking the Court to so order the foreclosure and sale of said mortgaged property as to preserve the priority of the First Mortgage bondholders, and at the same time permit the holders of the other subsequent liens and interests to participate in the benefit of such sale and foreclosure; it is therefore further ordered and decreed: That Lewis M. Fisher be, and is hereby appointed a Master, for the purpose of making and conducting the sale under the decree of said

mortgaged property, the same to be sold under the provisions of said First Mortgage in the bill described.

The said sale to be made forthwith, in default to pay as herein decreed, at the front door of the County Court house, in the city of Marshalltown, Iowa, four weeks' notice of the time and place of said sale to be given by said Master, by publishing notice thereof in The Financier, New York, and in Des Moines Register, and one newspaper published in Marshalltown, Iowa. That such property be sold to the highest and best bidder; and that the Master make full report of his proceedings to this Court, for its consideration and approval. The said sale so made by said Master not to be deemed to be final untill approved by this Court.

Fifth.—That the said Farmers' Loan and Trust Company, complainant herein, for the purpose of carrying out the agreement of the parties to said mortgage, is hereby authorized and directed to bid at the sale of said mortgaged property as Trustee for the first mortgage bondholders bidding thereat, at least the amount of principal and interest of said First Mortgage Bonds.

That if said Trustee, as aforesaid, shall become the purchaser of said property at such sale, the title shall pass absolutely to said Trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the First, Second and Third Mortgage bondholders, creditors and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said Trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said First Mortgage, and of this decree, and to be approved by a majority of said First Mortgage bondholders, in which said corporation, the controlling interest and power of management shall be given to the First Mortgage bondholders in such a manner as the majority of such First Mortgage bondholders shall indicate and provide, and in which the Second Mortgage bondholders shall receive a second class of stock for the full amount, principal

and interest, of said Second Mortgage bonds; and in which corporation the Third Mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation.

It is further ordered that said Trustee shall make full report of its proceedings under this decree to this Court, and shall submit the conveyance to be made to the new corporation herein provided for, together with the articles of incorporation of said company, to this Court, for approval and confirmation.

Sixth.—That if any party, other than the complainant, should become the purchaser of said property at such sale, such purchaser shall deposit with the Master, so soon as said property is struck off to him, the sum of $100,000 in gold as earnest money. And if such purchaser shall fail so to do, such failure shall be deemed a withdrawal of his bid, and said Master shall forthwith again offer said property for sale under the provisions of this decree.

That, as it is impossible to properly separate said property into parcels, the Master is directed to sell the said mortgaged property and everything covered by the mortgage together as an entirety.

Seventh.—That the owners of said Second and Third Mortgage Bonds, the general creditors and stockholders of respondent shall have the righr to redeem said mortgaged property at any time within one year from the date of said sale, but if said property is not redeemed with in said year from the date of said sale, then the right of redemption of said parties and all of them shall be forever barred and foreclosed. Said redemption herein last named, shall be the amount of principal and interest herein named with ten per cent. interest in gold.

Eighth.—That the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property, or any property in the use of said railroad company, or any part thereof, by virtue of contracts, or cases whereby material, labor, or property has been furnished for, or placed upon, said defendant's road, shall not be affected by this decree, the same being taken subject to the right and equities of said parties as the same may be established and declared hereafter by this Court.

Ninth.—That John N. Rogers be and is hereby appointed Special Master to ascertain and report to this Court the proper and total amount of costs, fees and expenses attending these foreclosure proceedings, which said costs, fees, and expenses shall be paid out of any funds in the hands of the Receiver not otherwise appropriated, and any balance left unpaid shall be a lien upon said mortgaged property in the hands of the Trustee, and payment thereof shall be required of said Trustee before delivering over said property to any company organized to receive and hold the same under the provisions of the Trust Deed, and of this decree.

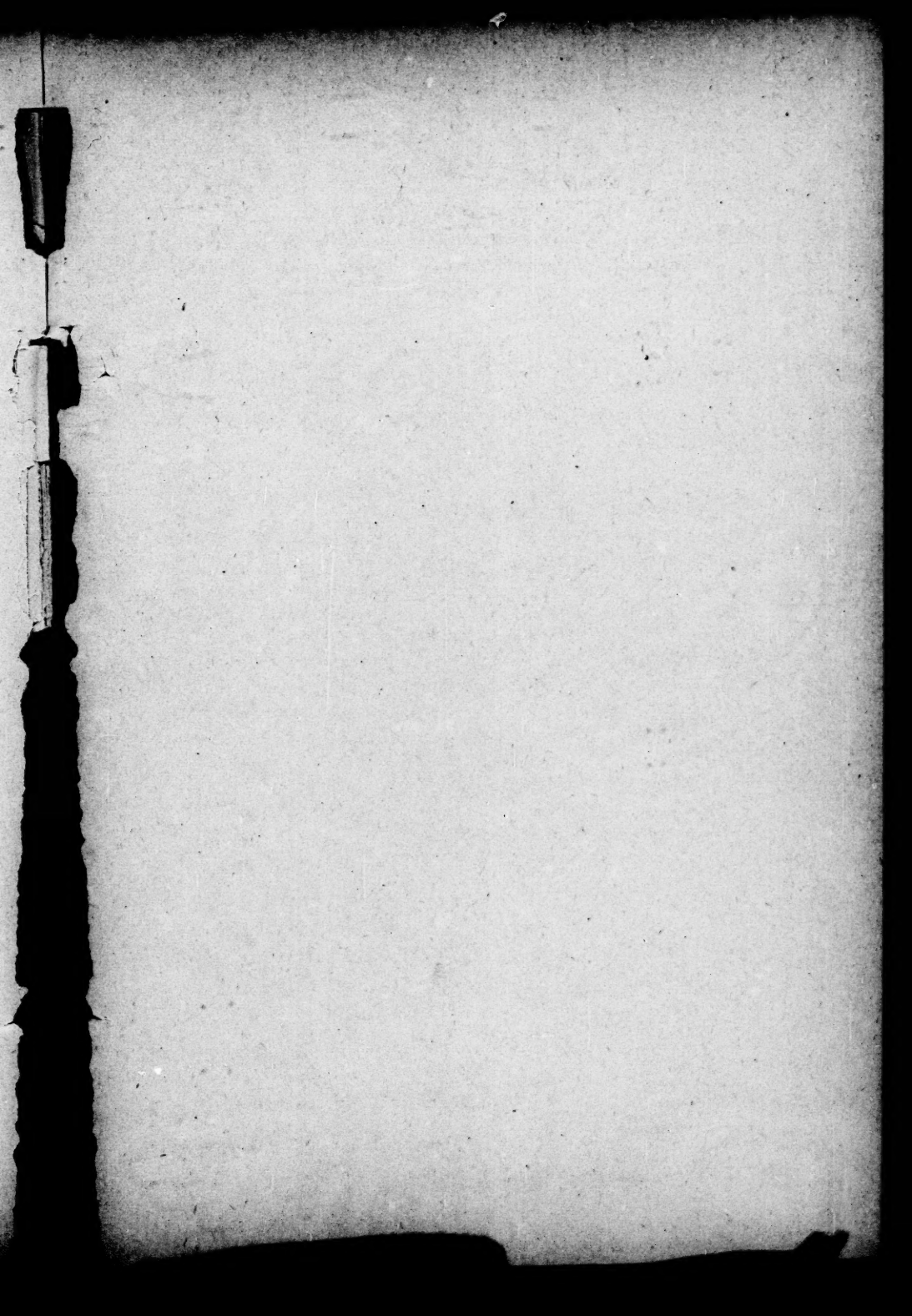
(Signed) JOHN F. DILLON,

Judge.

Endorsed: Filed October 22, 1875.

GEORGE H. CORKHILL,

Clerk.



SUPREME COURT OF THE UNITED STATES.

NO. 175.

(Submitted with No. 570.)

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, Intervenors. APPELLANTS.

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA ET AL., APPELLLES, AND

THE HASKELL & BARKER CAR COMPANY, Interpleaders, APPE LEES.

Appeal from the Circuit Court of the United States for the District of Iowa.

Extracts from the Printed Record of all thereof relating to the claim of

THE HASKELL & BARKER CAR CO., APPELLEES,

AND

ARGUMENT FOR SAID APPELLEES

By C. C. COLE.

SUPREME COURT OF THE UNITED STATES.

NO. 175.

(Submitted with No. 570.)

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, Intervenors, APPELLANTS,

vs.

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Appeal from the Circuit Court of the United States for the District of Iowa.

Extracts from the Printed Record of all thereof relating to the claim of

THE HASKELL & BARKER CAR CO., APPELLEES,

AND

ARGUMENT FOR SAID APPELLEES

BY C. C. COLE.

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United States Circuit Court, District of Iowa.

RUSSELL SAGE ET AL., Appellants,
vs.
THE CENTRAL RAILROAD CO. OF IOWA ET AL., AND THE HASKELL & BARKER CAR CO., Appellees.

Extracts from the record in the main case, so far as applicable to claim of The Haskell & Barker Car Co., appellees, followed by the argument for said appellees.

(Printed Record, pages 248–252.)

On the 8th day of May, 1875, the Haskell & Barker Car Company, by its attorneys, filed in said clerk's office its petition of intervention, which said petition is in the words and figures following, to-wit:

[T. J. Fletcher, Auditor.]

CENTRAL RAILROAD OF IOWA, AUDITOR'S OFFICE,
MARSHALLTOWN, IOWA, April 21st, 1875.

D. N. PICKERING, ESQ.,
GENERAL SUPERINTENDENT AND RECEIVER,

Dear Sir:—The papers in the Haskell & Barker claim are returned herewith. I find the amount due them March 1st, 1875, to be sixty-five hundred seventy-one and 18-100 (6,571 18-100) dollars, as per statement below.

Yours respectfully,

(Signed) T. J. FLETCHER, *Auditor.*

On note dated June 7th, 1872, at 6 months		$ 5,202.08
Balance of interest due March 1st, 1875		736.96
		$5,939.04
On note dated June 7th, 1872, at 4 months	5,143.47	
Less amount of partial payment	4,993.00	
	150.47	
Balance of interest due March 1st	481.67	
		632.14
		$6,571.18

N. B.—With the correction herein made, the undersigned recommends the passing of the account by the court and making order as prayed for.

(Signed) D. N. PICKERING, *Receiver.*

UNITED STATES OF AMERICA.
District of Iowa, ss.

In the Circuit Court of the United States for the district of Iowa.

FARMERS' LOAN & TRUST COMPANY OF NEW YORK
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA.

To the honorable judge of said court:

Your petitioner, Haskell & Barker Car Company, a corporation duly created by the laws of the State of Indiana, would respectfully represent unto your honor that the defendant, The Central Railroad Company of Iowa, on the 20th day of May, A. D. 1872, entered into a certain contract or agreement in writing with your petitioner, a copy of which is hereto attached and marked "Exhibit A," and to which your petitioner begs leave to refer as a part of this petition, and as showing in detail the contract between the parties thereto.

Your petitioner further shows that in pursuance and in accordance with the terms of said contract, your petitioner delivered to said railroad company two first-class passenger cars and two baggage cars, and said railroad company, in addition to its cash payment, executed and delivered therefor to your petitioner its two certain promissory notes, each dated June 7th, 1872, and due respectively in four and six months after date, each of said notes including in their principal amount, interest at the rate of seven per cent per annum until maturity, and bearing interest after due at the rate of ten per cent per annum, the first of said notes being for the sum of $5,143.47; the second being for the sum of $5,202.03.

Your petitioner further shows that only partial payments have been made upon said notes, and that there is now justly due and owing to your petitioner on said first note the sum of $659.75, and on said second note $5,955.86, making a total of $6,615.61, which amount your petitioner avers is wholly and justly due and unpaid and owing your petitioner under said contract, after allowing all just offsets, deductions and allowances.

Your petitioner begs leave to refer to a statement of the amount so due as aforesaid, hereto attached and marked "Exhibit B."

Your petitioner further shows that by the terms of said contract said cars were to remain the property of your petitioner until paid for in full, and that said cars should be and remain personal property until the price agreed upon should be fully paid, and that if default should be made by said railroad company in the payment of any or either of said notes, your petitioner should have the right to reclaim and take possession of said cars, or any one or more of them, wherever the same may be, and recover them from the possession of said railroad company or any person or corporation having the possession of the same, and sell or otherwise dispose of the same as it shall think proper.

Wherefore your petitioner prays that the receiver in the above entitled cause may be ordered and directed by this honorable court to

pay to your petitioner the amount due it from said railroad company upon said notes according to the terms of said contract. And as in duty bound your petitioner will ever pray, etc.

March 1st, 1875. HASKELL & BARKER CAR CO.,
(Signed) By F. HASKELL, *President.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

On this sixth day of March, A. D. 1875, personally appeared before me Frederick Haskell, and made oath and says that he has heard read the foregoing petition and knows the contents thereof, and that the same are true of his own knowledge.

Affiant further says that he is president of Haskell & Barker Car Company, and makes this affidavit on its behalf.

(Signed) F. HASKELL.

Subscribed and sworn to before me this sixth day of March, 1875.
[SEAL.] EDWARD W. RUSSELL,
Notary Public in and for the County of Cook, State of Illinois.

EXHIBIT A.

This agreement, made this 20th day of May, 1872, by and between the Haskell and Barker Car Company, of Michigan City, Ind., party of the first part, and the Central Railroad of Iowa, party of the second part, witnesseth:

That said party of the first part, in consideration of the agreements and covenants of the party of the second part hereinafter contained, agree to furnish for the use of the said party of the second part two first-class passenger cars and two baggage cars, delivered on the track of the Michigan Central R. R. Co., at Michigan City, Ind., on or before the 10th day of June next, said cars to remain the property of the said party of the first part until the said party of the second part shall have fully complied with its agreements hereinafter contained, and they shall have been paid for in full by the said party of the second part.

And the said party of the second part agrees, upon receiving said cars, or any portion thereof, to pay to the said party of the first part the sum of $1,700 on each passenger car, and $783.33 on each baggage car per car for each and every car so furnished and received by it, and to execute and deliver to the parties of the first part its notes for the further sum of $1,700 on each passenger car, and $783.33 on each baggage car, payable in four months, and $1,700 on each passenger car, payable in six months, and $783.33 on each baggage car, payable in six months, with interest at seven per cent per annum, notes payable at Merchants' National Bank, Chicago, Ill.

The full price of each passenger car is $5,100; the full price of each baggage car $2,350, paid and agreed to be paid for the furnishing of each and every of said cars; and upon the payment of said notes, and each and every of them, together with the said cash payment of ($4,966.66) forty-nine hundred sixty-six and sixty-six one-hundredth dollars, the said parties of the first part agree to sell and convey to said

party of the second part all and every of the cars so furnished and received by said second party.

It is expressly understood and agreed by and between the said parties that said cars shall be and remain personal property until the price above specified shall be fully paid, and that if default shall be made by said party of the second part, in the payment of any or either of the notes so to be given by it as aforesaid, or in the performance of any of its agreements herein contained, the said party of the first part shall have the right to reclaim and take possession of said cars, or any one or more of them, wherever the same may be, and recover them from the possession of said party of the second part, or any person or corporation having the possession of the same, and sell or otherwise dispose of the same as they shall think proper.

(Signed) THE CENTRAL R. R. CO. OF IOWA,
By C. C. GILMAN, *President.*

F. HASKELL, *President Haskell and Barker Car Co.*

(Copy of contract.)
[Stamp]

EXHIBIT B.

The Central Railroad Company of Iowa to Haskell and Barker Car Co., *Dr.*

1872.			
June 7.	For one note at 4 months	$5,143.47	
	Interest to March 1, 1875	1,191.97	
		$6,335.44	
	By payments and interest to Mar. 1, '75	5,675.69	
	Balance due March 1, 1875		$ 659.75
June 7.	For one note at 6 months	$5,202.08	
	Interest to March 1, 1875	1,243.90	
		$6,445.98	
	By payments and interest to Mar. 1, '75	490.12	
	Balance due March 1, 1875		5,955.86
	Total		$6,615.61

The notes draw ten per cent interest after due.

STATE OF ILLINOIS, }
COUNTY OF COOK. }

Frederick Haskell, of the city of Chicago, being first duly sworn, on oath deposes and says that the foregoing account, marked "Exhibit B," of Haskell and Barker Car Company against the Central Railroad Company of Iowa, is just and unpaid, and that all credits and offsets

thereto have been allowed; that affiant is president of said car company and makes this affidavit on its account.

(Signed) F. HASKELL.

Subscribed and sworn to before me, this 6th day of March, A. D. 1875,

[Seal] (Signed) EDWARD W. RUSSELL,
Notary Public in and for the county of Cook and State of Illinois.

(Endorsed:) Original petition. Haskell and Barker Car Company to the U. S. Circuit Court, District of Iowa, in the case Farmers' Loan and Trust Company v. Central R. R. Co. of Iowa.

A copy of this petition has been served on me, 3 May, 1875.

(Signed) JAS. GRANT,
For F. L. and T. Co.

Filed May 8, 1875.

GEORGE B. CORKHILL, *Clerk.*

On the 21st day of October, the same being of the October term, 1875, of said court, there appears in the records of the proceedings thereof in said cause the following entry:

United States Circuit Court, District of Iowa, October term, 1875.

THURSDAY, October 21, 1875.

THE FARMERS' LOAN AND TRUST COMPANY,
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA, "Haskell & Barker Car Company," petitioners. } No. 501. Equity.

It is ordered herein that the balance due the above petitioners for cars, as alleged in their petition, not exceeding in all the sum of sixty-five hundred and seventy-one and eighteen-hundredth dollars, as principal, be paid them by the receiver from time to time as the earnings of the road and the state of the funds in his hands may, in his judgment, warrant.

(Signed) JOHN F. DILLON, *Judge.*

ARGUMENT.

We have copied, *supra*, so much, and all, of the record of the main case—*The Farmers Loan and Trust Company v. The Central Railroad Co. of Iowa et al.*—as in any manner relates to, or bears upon, the rights of the Haskell & Barker Car Co., it being all the record therein respecting the claim of said Haskell & Barker Car Co., petitioners and intervenors.

The facts shown thereby, as we understand them, are, in brief, as follows, to-wit:

On May 20, 1872, the Haskell & Barker Car Co. made a contract with the Central Railroad Co. of Iowa, to furnish for the use of, and agreed to sell to, said railroad company, two first-class passenger cars and two baggage cars, at the price of $5,100 for each passenger car and $2,350 for each baggage car, to be delivered on or before June 10, then next following; it being expressly understood, and agreed, that said cars were to remain personal property, and the right was reserved to the Haskell & Barker Car Co. to take possession of said cars and sell the same for the payment of any deficiency remaining unpaid in case of default in the payment of the consideration, which was to be paid, as by the terms of the contract, a part in four months and a part in six months from the time of delivery. On June 7, 1872, the cars were delivered according to contract, and the Central Railroad Co. executed its notes, one due in four months and the other in six months from date. Certain payments were made upon said first note, prior to the commencement of the main action to foreclose the mortgages made by said Central Railroad Co. upon its property, which action was commenced in June, 1874.

Afterward, and on October 16, 1874, a provisional or temporary Receiver was appointed, and, on January 7, 1875, such appointment was made permanent and the Receiver took possession of all the property of said railroad company and also of the cars furnished said company by the petitioners and intervenors herein, the Haskell & Barker Car Co. On may 8, 1875, the said Haskell & Barker Car Co. filed its petition of intervention, setting up the facts as to the making of said contract, the delivery of the cars, and that a balance remained due thereon, with ten per cent interest from March 1, 1875, and asked that the Receiver be directed to pay the balance due to the Haskell & Barker Car Co. A statement made by the auditor of said railroad company, showing the amount due March 1, 1875, to be $6,571.18, was filed with the

petition for intervention. Afterward, and on October 21, 1875, upon final hearing hereof, an order was made by the court, that the amount due the Haskell & Barker Car Co., as ascertained by the auditor of the railroad company, to-wit: $6,571,18 as principal, be paid the said Haskell & Barker Car Co. by the Receiver, from time to time, as the earnings of the road and the state of the funds in his hands would warwarrant. From this order the appellants, Russell Sage and others, who claim to be owners of first mortgage bonds, claim to have appealed.

I.

There has been no appeal from the decree in favor of the Haskell & Barker Car Co.

The appeal in the main case is taken by Russell Sage, James Buell and N. A. Cowdrey. They were not parties to the original bill, nor were they ever made parties to the proceeding in such way or sense as to constitute them *parties to the action.* The decree in favor of the Haskell & Barker Car Co. was rendered October 21, 1875. The October term of Court was adjourned over to January 11, 1876. On January 14, 1876, it being still of the October term, the appellants, Sage, Buell and Cowdrey, on application therefor, were "permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their several interests therein, and in their own names an appeal to the Supreme Court from the *decree* entered herein on the 22*d day of October*, 1875." (Printed Record, page 1206.)

They were not made *parties in full* to the suit, but they were *permitted* to become *so far parties* as to prosecute an appeal from *a particular* order or decree. They have no right here other than that granted them by the order of the court above quoted. They cannot therefore claim that they have a right to appeal from the decree in favor of The Haskell & Barker Car Co., rendered October 21, 1875. That is in itself not only a *final* order or decree in its language and terms, but it is also an adjudication of the rights of the parties to the suit in respect to the claims of the said Haskell & Barker Car Co.

Certainly it cannot be claimed that a limited and special permission to these appellants to appeal from a decree in favor of the Farmers' Loan and Trust Company, rendered October 22, 1875, foreclosing the mortgages, gave also by implication or otherwise, the right to appeal from a decree in favor of the Haskell & Barker Car Co., rendered Octo-

ber 21, adjudging a certain sum to be due and directing its payment by the Receiver.

An appeal might have been taken, by proper parties, from this decree or order, of October 21, 1875, in favor of The Haskell & Barker Car Co., for that it is a *final* decree or order, and also an adjudication of the rights of the parties in the subject-matter of the claim made by the interplea of said Car Co. But the appellants, in their main case and appeal, did not ask or obtain permission to appeal therefrom. Not only so, but they have not appealed therefrom. Their petition for appeal only prays an appeal from the decrees "made on the 22d day of October, 1875, and the 14th day of January, 1876" (that limiting their right as parties). See printed record, page 1210. Further, the citation is to show cause "why said order and decree in said appeal mentioned, should not be corrected," etc. (printed record, page 1219). And the appeal bond recites the decrees made on "October 22, 1875, and on the 14th day of January, 1876," as being the only decrees or orders appealed from (printed record, page 1219). Finally, on this point, no errors are assigned in any way upon the decree, in favor of the Haskell & Barker Car Co. We submit, therefore, confidently, that no review of the decree in favor of the Haskell & Barker Car Co. can be made on this appeal, because:

1. Appellants have no permission to appeal therefrom.
2. They have not prayed an appeal therefrom.
3. They have not taken an appeal therefrom.
4. They have obtained no citation thereon.
5. They have given no appeal bond therefor.
6. They have not assigned errors in respect thereto.

Nothing can be claimed for the appellants, by reason of their appeal in case No. 570, now pending and on hearing with this case (No. 175), for that, on motion to dismiss appeal in that case, it was decided by this court in *Sage v. Railroad Co.*, 96 U. S. Reports, 712, that, "It is clear that this appeal does not bring up for examination the orders of October 21, 1875. Every proceeding in the cause which was prior to October 22, 1875, must be examined, *if at all*, under the appeal from the decree of that date, still pending here.

Upon the merits, the decree or order is right.

1. The cars for which the money was decreed or ordered to be paid,

have been used by the Receiver and have contributed to the earning of the fund out of which the payment is ordered to be made.

2. By the final decree in the cause rendered October 22, 1875, the cars furnished by the Haskell & Barker Car Co. were decreed to be sold together with all the other property of the railroad company, to pay the mortgage debts (Printed Rec., 1196–9); thereby showing that the court, by its several decrees, has administered substantial equity to all the parties.

3. The amount decreed to be paid to the Haskell & Barker Car Co. is just the amount shown to be due by the certificate of the auditor of the defendant, Railroad Co.; it is approved by the Receiver, and is not controverted by the complainants or their counsel, although the petition and claim were served May 3, 1875. The claim is just and uncontroverted.

4. Neither the original complainant in this suit, nor the appellants, acquired any absolute legal right to the net earnings or proceeds of the mortgaged property, and certainly none to the earnings made by the Haskell & Barker cars. The appointment of a Receiver is a matter within the discretion of the chancellor, and surely he will not use that discretion in such a way as to effectuate injustice—the injustice of taking the Car Co.'s property to pay the Railroad Co.'s debts—but will so direct the Receiver, in his equitable discretion, as that the rights and equities of all shall be preserved.

High on Receivers, 337–8, and authorities cited.

Douglas v. Cline, 12 Bush, (Ky.), 608 (i.e.), 622–7.

The Syracuse Bank v. Tallman, 31 Barb., 201.

Myers, trustee, v. Johnston et al., 53 Ala., 237 (i.e.), 38.

Duncan v. C. & O. Co., 9 Am. Ry. Reg., 386.

Respectfully submitted,

C. C. COLE,

Counsel for appellees, The Haskell & Barker Car Co.

SUPREME COURT OF THE UNITED STATES.

NO. 175.

(Submitted with No. 570.)

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, Intervenors, APPELLANTS,

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA ET AL., APPELLEES, AND

JOHN S. NEWBERRY ET AL., Interpleaders, APPELLEES

Appeal from the Circuit Court of the United States for the District of Iowa.

Extracts from the Printed Record of all thereof relating to the claim of

JOHN S. NEWBERRY, ET AL., TRUSTEES, APPELLEES,

AND

ARGUMENT FOR SAID APPELLEES.

By C. C. COLE.



SUPREME COURT OF THE UNITED STATES.

NO. 175.

(Submitted with No. 570.)

RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, Intervenors, APPELLANTS,

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the District of Iowa.

Extracts from the Printed Record of all thereof relating to the claim of

JOHN S. NEWBERRY, ET AL., TRUSTEES, APPELLEES,

AND

ARGUMENT FOR SAID APPELLEES.

BY C. C. COLE.

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United States Circuit Court, District of Iowa.

RUSSELL SAGE ET AL., Appellants,
vs.
THE CENTRAL RAILROAD OF IOWA ET AL., AND JOHN S. NEWBERRY ET AL., TRUSTEES, ETC., Appellees.

Extracts from record in main case, so far as applicable to claim of John S. Newberry et al., appellees, followed by argument for said appellees:

(Printed Record, pages 229–234.)

On the 9th day of March, 1875, John S. Newberry *et al.*, by their attorneys, filed in said clerk's office their petition and interplea in said cause, which said petition is in the words and figures following, to-wit:

Petition and interplea of John S. Newberry and others, Trustees.

United States Circuit Court, District of Iowa.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEES, Plaintiffs,
vs.
THE CENTRAL RAILROAD OF IOWA
Defendants.
} In Chancery.

John S. Newberry and James McMillan, of Detroit, in the State of Michigan, Warren Currier, William McMillan, and James Thompson, of St. Louis, in the State of Missouri, on leave of court and by copy of petition and interplea, show to the court that they are trustees, for and in behalf of the shareholders in an association known as the St. Louis and Northern Car Company, located in said St. Louis, and that as such trustees they are the legal owners and holders of the two hundred cars hereinafter mentioned, and the rents thereof accrued and to accrue.

The petitioners further represent that heretofore, to-wit: on the first day of September, 1873, at Boston, in the State of Massachusetts, that said railroad company, by its chief officer, Issac M. Cate, the President thereof, by its agreement in writing duly executed by said officer, contracted with the Missouri Car and Foundry Company, of said St. Louis, for the temporary hiring and ultimate purchase from said last mentioned company, of one hundred coal cars and one hundred box-cars, to be used and employed by said railroad company in the transaction of its carrying business: that is to say, said Missouri Car and Foundry Company, in and by said writing on its part agreed to furnish and deliver to said railroad company, in St. Louis, said two hundred cars by the 15th day of October, 1873, on the terms and conditions in said contract specified, to-wit: that

said railroad company should accept and receive said cars at the point of delivery as the same should be tendered, and take, use, and employ the same in its said business for the term of five years next following such delivery, and for the use thereof, as a monthly rental, to pay said Missouri Car and Foundry Company, each successive month during said term, for said coal cars, the sum of fifteen dollars per car per month; and for said box-cars the sum of twenty dollars per month per car, making a monthly rental in the aggregate of thirty-five hundred dollars; such monthly payments to be made to said Missouri Car and Foundry Company, or its assigns, on the twentieth day of each successive month following that in which the rent was earned.

And the petitioners further show that it was further provided in said contract that said railroad company, at the end of said term of five years, should become the purchasers of said cars upon a valuation to be made as provided in said contract, said Missouri Car and Foundry Company agreeing to sell, and said railroad company agreeing to purchase, said two hundred cars at the time and in the manner aforesaid, and at the price that should be fixed by the appraisers provided for in said contract; and that until such price should be fully paid, together with all rent in arrear, said cars should remain the property of the vendors, no title passing to the vendee until such payments should be fully made.

And the petitioners further show to the court that it was provided in and by said contract, that in case of default in the payment of said rent, or any part thereof, when due, or said purchase money by said railroad company, that said Missouri Car and Foundry Company and its assigns, at its and their discretion, might seize said cars wherever the same might be found, with or without legal process, and resume possession of the same, and sell and dispose of said cars in the manner pointed out in said contract, and apply the proceeds of such sales as said contract requires: first, to meet expenses; second, to satisfy said rent and purchase money, and the balance, if any, to said railroad company.

And it is further shown to the court that said two hundred cars were duly furnished to said railroad company in the time and manner provided in said contract, to-wit: in the month of October, 1873, and that the same were duly accepted and received by said railroad company, and have ever since been in the possession and use of said company, and that said cars are now in its possession and use of D. N. Pickering, the receiver thereof, duly appointed by this court, and further, that the rent of said cars was paid for the months of October and December, 1873, and for the months of January, July, August, September, October and November, 1874; and that said rent is in arrear and unpaid for the month of November, 1873, and for the months of February, March, April, May, June and December, 1874, and for the months of January and February, 1875, in all nine months, and making in the aggregate the sum of thirty-one thousand five hundred dollars of rent in arrear and unpaid on the first day of March, 1875, together with the accrued interest;

and that of this sum ten thousand five hundred dollars accrued while said cars were in the service and use of said receiver, to-wit: the rent for the months of December, January and February last, said cars being so used and employed by said receiver under the order and direction of this court.

And the petitioners further show that said Missouri Car and Foundry company, for a valuable consideration, on the tenth day of October, 1873, sold, assigned and transferred said cars, together with said contract and all the vendors' rights therein and thereunder, to the petitioners, so that the legal title and ownership thereof then passed to and vested in them, whereof said railroad company had notice, and the petitioners aver that the whole of the aforesaid rent now in arrear, to-wit: said sum of thirty-one thousand five hundred dollars, is now due and owing to them, and further that said contract was duly recorded in the recorder's office of the county of Marshall, in the State of Iowa, at Marshalltown, the locality of the principal office, and place of business of said railroad company.

Wherefore, the petitioners pray this honorable court to make an order touching the premises, directing said D. N. Pickering, receiver as aforesaid, from the proceeds and income of said railroad, to pay to the petitioners the aforesaid rent now in arrear, and especially the ten thousand five hundred dollars that has accrued while said cars were in his possession and use as such receiver in operating said railroad and protecting the interests thereof, and further directing the said receiver to pay the rent of said cars as the same shall accrue from month to month hereafter, until the further order of this court.

And the petitioners ask for such other and further relief as shall be considered by the court appropriate to the facts herein alleged.

WARREN CURRIER,
Attorney for Petitioners.

Eastern District of Missouri, ss:

William McMillan, trustee of the St. Louis and Northern Car Company. At office in St. Louis, Missouri, personally appeared William McMillan trustee of the St. Louis and Northern Car Company, who, being duly sworn, deposes and says that he has full knowledge of the facts alleged in the foregoing document, and that they are true as stated.

(Signed)

T. D. TOWNSEND,
U. S. Comm'r, E. Dist. of Missouri.
ST. LOUIS, MO., FEB. 27th, 1875.

(Endorsed:) The Farmers' Loan and Trust Company vs. The Central Railroad Company of Iowa. Petition and interplea by John S. Newberry *et al.*, filed with me March 2, 1875.

JOHN F. DILLON.

Filed Mar. 9, 1875.

GEORGE R. CORKHILL, *Clerk.*

On the same day to-wit: March 9, 1875, John S. Newberry *et al.*, by their attorneys, filed in said clerk's office an agreement in said cause, which said agreement is in the words and figures following, to-wit:

United States Circuit Court.

THE FARMERS' LOAN AND TRUST COMPANY, *vs.* THE CENTRAL RAILROAD OF IOWA; JOHN S. NEWBERRY, and others, trustees, interpleaders. } In Chancery.

AT CHAMBERS, March 21, 1875.

It is agreed between the plaintiff and the interpleaders herein, that the plaintiff shall answer the interplea in ———— days, and that the issues thus joined shall be in order for trial at this next May term of the court.

(Signed) WARREN CURRIER,
Att'y for Interpleaders.

PLATT SMITH,
for the Bondholders.

(Endorsed:) In Circuit Court U. S., Dist. of Iowa. The F. L. and T. Co. *vs.* I. C. R. R. Co. Agreement of Warren Currier and Platt Smith. Filed March 9, 1875.

GEORGE B. CORKHILL, *Clerk.*

On the 12th day of October, 1875, there was filed in said clerk's office a contract, a true copy of which is as follows, to-wit:

This agreement, made and entered into this 12th day of October, 1875, by and between D. N. Pickering, the receiver of the property and assets of the Central Railroad Company of Iowa, of the first part, and John S. Newberry and James McMillan, of Detroit, Michigan, Warren Currier, William McMillan and James Thompson, of Saint Louis, Missouri, trustees of an association known as the St. Louis and Northern Car Company, parties of the second part, witnesseth:

That said first party, in consideration of the agreement of the second party, and in modification and enlargement of the contract between said railroad company and said second parties, of September 1, 1873, for the rental and ultimate purchase of two hundred cars, as set out in the interplea of said second parties, now on file in the office of the clerk of the Circuit Court of the United States for the district of Iowa, in a cause now pending in said court, wherein the Farmers' Loan and Trust Company is plaintiff, and said railroad company is defendant, and the said second parties are interpleaders, has agreed to pay to said second parties, at the city of Saint Louis, in the State of Missouri, the sum of one hundred and twenty-five thousand seven hundred and thirty-six dollars, in the time and man-

ner stated below, to-wit: twenty-four thousand dollars in twelve equal consecutive monthly payments of two thousand dollars each, commencing on the first day of December next, and the balance of said sums to-wit: one hundred and one thousand seven hundred and thirty-six dollars, in thirty-six equal consecutive monthly payments, commencing on the first day of December, 1876.

In addition to these payments said first party agrees to pay the interest on said principal sum, and the successive balances thereof, semi-annually, to-wit: on the first day of May and the first day of November of each year, the same to be computed and paid at the rate of seven per cent per annum from and after said first day of November next.

On the payment in full of said principal sum, and the interest thereon as aforesaid, the title to said cars, it is agreed, shall vest in said railroad company or its successors, and not before or otherwise.

And the second parties, in consideration of the agreement of the first party as stated above, agree to accept said several payments in lieu of the rents and other payments called for by said contract between said second parties and said railroad company, and to permit said cars to remain upon said railroad and in the service of said railroad company, and its successors and assigns, without charge or rent therefor, so long as said payments shall be faithfully and promptly made.

And it is further agreed that this contract shall, with the permission of the court, be placed on file in the office of the clerk of said Circuit Court, in connection with said interplea, as constituting a part of the records and proceedings therein, and as forming in part a foundation for an order or decree of the court in respect to said cars; and it is expressly understood and agreed between the parties that this contract shall not be binding on either, or have any force or validity whatever against either, until the same is approved by the court aforesaid, or the judge thereof. Executed the date aforesaid.

(Signed) D. N. PICKERING,
Receiver of Central R. R. of Iowa.

(Signed) JOHN S. NEWBERRY,
(Signed) JAMES McMILLAN,
(Signed) WILLIAM McMILLAN,
(Signed) JAMES THOMPSON,
Trustees.

By their agent and attorney,

WARREN CURRIER.

(Signed) WARREN CURRIER,
Trustee.

(Endorsed:) D. N. Pickering, receiver, with John S. Newberry. Contract, Oct., 1875. Contract filed Oct. 12, 1875.

GEO. B. CORKHILL, *Clerk.*

On the 21st day of October, 1875, the same being the October term of said court, there appears in the records of the proceedings thereof in said cause, the following entry, to-wit:

United States Circuit Court, District of Iowa. October Term, 1875.

THURSDAY, October 21st, 1875.

THE FARMERS' LOAN AND TRUST COMPANY,
vs.
THE CENTRAL RAILROAD COMPANY OF IOWA, JOHN S. NEWBERRY, and others, interpleaders. } No. 501. Equity.

And now, at this day, to wit: October 21st, 1875, the parties aforesaid appeared by their respective attorneys of record, and consent that the interplea of John S. Newberry and others, duly filed herein, be taken as confessed; and it is so ordered and adjudged.

And it appearing to the court that the two hundred cars mentioned in the interplea have been required for the successful operation of the railroad of said railroad company, and that they are still so required, and that the same have been continuously in the service and employment of the receiver of the property and assets of said railroad company for the last eleven months, without any compensation having been made to said interpleaders therefor;

And whereas D. N. Pickering, the receiver aforesaid, in compromise and adjustment of the claim of said interpleaders for such service, and for the value of said cars, has entered into a contract with said interpleaders in words and figures following, to-wit:

This agreement, made and entered into this 12th day of October, 1875, by and between D. N. Pickering, the receiver of the property and assets of the Central Railroad Company of Iowa, of the first part, and John S. Newberry and James McMillan, of Detroit, Michigan, Warren Currier, William McMillan and James Thompson, of St. Louis, Missouri, trustees of an association known as the St. Louis and Northern Car Company, parties of the second part, witnesseth:

That said first party, in consideration of the agreement of the second party, and in modification and enlargement of the contract between said railroad company and said second parties of September, A. D. 1873, for the rental and ultimate purchase of two hundred cars, as set out in the interplea of second parties, now on file in the office of the clerk of the circuit court of the United States for the District of Iowa, in a cause now pending in said court, wherein the Farmers' Loan and Trust Company is plaintiff, and said railroad company is defendant, and the said second parties are interpleaders, has agreed to pay to said second parties, at the city of St. Louis, in the State of Missouri, the sum of one hundred and twenty-five thousand seven hundred and thirty-six dollars, in the time and manner stated below, to-wit: twenty-four thousand dollars in twelve equal consecutive monthly payments of two thousand dollars each, commencing on the first day of December next; also,

the balance of said sum, to-wit: one hundred and one thousand seven hundred and twenty-six dollars in thirty-six equal consecutive monthly payments, commencing on the first day of December, 1876; in addition to these payments said first party agrees to pay the interest on said principal sum and the successive balances thereof semi annually, to-wit: on the first day of May and the first day of November of each year, the sums to be computed and paid at the rate of seven per cent per annum from the first day of November next. On the payment in full of said principal sum and the interest thereon as aforesaid, the title to said cars it is agreed shall vest in said railroad company or its successors, and not before that or otherwise. And the second party, in consideration of the agreement of the first party, as stated above, agrees to accept said several payments in lieu of the rents and other payments called for by said contract between said second parties and said railroad company, and to permit said cars to remain upon said railroad and in the service of said railroad company and its successors and assigns, without charge for rent therefor, so long as said payments shall be faithfully and promptly made.

And it is further agreed that this contract shall, with permission of the court, be placed on file in the office of the clerk of said court in connection with said interplea, as constituting a part of the records and proceedings therein, and as forming in part a foundation for an order or decree of the court in respect to said cars; and it is expressly understood and agreed between the parties that this contract shall not be binding on either, or have any force or validity whatever against either, until the same is approved by the court aforesaid, or the judge thereof.

Executed the date aforesaid.

D. N. PICKERING,
Receiver Central Railroad of Iowa.

JOHN S. NEWBERRY,
JAMES McMILLAN,
WILLIAM McMILLAN,
JAMES THOMPSON,
Trustees.

By their agent and attorney,

WARREN CURRIER.

WARREN CURRIER,
Trustee.

And whereas, it appears that said contract is reasonable and just, and promotive of the interest of said railroad company and of its creditors, and that the same was made with the consent and approbation of the different parties to these proceedings:

Now, therefore, it is considered, ordered and adjudged by the court that said contract as above recited, be approved, and the same is approved, ratified and confirmed accordingly.

And it is further considered, ordered, and adjudged by the court that said sum of one hundred and twenty-five thousand seven hundred and thirty-six dollars, specified in said contract, with the inter-

est thereon, be paid to said interpleaders out of the assets, property, and income of said railroad company, in the time and manner provided in said contract, as a legal and valid claim against the same, created by the proper and legal act of said receiver in the due administration of his office, under the order and direction of the court. And it is ordered and adjudged that said sum be paid to said interpleaders, in the time and manner aforesaid, as a claim having precedence and priority over the claims of the plaintiff in the suit above entitled, and of the claims of the various parties represented by said plaintiffs in its capacity and relation as trustee.

JOHN F. DILLON, *Judge.*

(Printed Record, pages 1205–6.)

On the 14th day of January, 1876, the same being of the October term, 1875, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to-wit:

United States Circuit Court, District of Iowa, October term, 1875,

Friday, January 14, 1876.

THE FARMERS' LOAN AND TRUST COMPANY, *Trustee,* *vs.* THE CENTRAL RAILROAD COMPANY OF IOWA and HUGH THORNTON, THE LE GRAND QUARRY COMPANY, LUSH CARTON & COMPANY, M. M. ST. JOHN, W. H. MOORE, H. J. BOARDMAN, C. M. STEWART, OLE OLESON, I. M. CATE, J. S. GILMAN, HORACE ABBOTT, DELANO SMITH, EDWIN WILLIGROD, JOHN TURNER, G. W. MAYBURY.	No. 501. EQUITY.

And now, on this day, to-wit: January 14th, 1876 (it still being of the October term, 1875), this cause came on for hearing upon the motion of Russell Sage, James Buell and N. A. Cowdrey, filed herein January 13, 1876, to set aside the decree of this court herein rendered October 22, 1875, which motion, after hearing counsel for and against the same, was by the court denied; to which order the said Sage, Buell and Cowdrey then and there excepted.

And on the same day, to-wit: January 14, 1876 (it still being of the October term, 1875), this cause came on for hearing upon the petition of said Russell Sage, James Buell and N. A. Cowdrey, filed herein January 11, 1876, stating that they were owners of first mortgage bonds to over $200,000 at their face value, exclusive of interest, and praying to intervene in this suit and become parties thereto. * * * * *

Upon consideration of the premises, it is now by the court ordered that Sage, Buell and Cowdrey be, and they are, hereby permitted to become so far parties to the suit as to prosecute, if they so

elect, for the protection of their said several interests therein, and in their own names, an appeal to the Supreme Court from the decree entered herein on the 22d day of October, 1875; and if said Sage, Buell and Cowdrey desire said appeal to operate as a supersedeas, the bond for that purpose is fixed at the sum of $1,000,000, to be given in 30 days from this date; and if so given, said appeal shall be regarded as taken and perfected on the 16th day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time, by order of the judge at chambers, as above shown; but if said appeal is not to operate as a supersedeas, the bond is fixed at the sum of $2,000.

ARGUMENT.

We have, *supra*, copied so much, and all, of the record of the main case—The Farmers' Loan and Trust Company v. The Central Railroad Company of Iowa *et al.*—as in any manner relates to, or bears upon, the rights of John S. Newberry *et al.*, trustees' intervenors, it being all the record therein.

The facts shown thereby, as we understand them, are, in brief, as follows: On September 1, 1873, and prior to any of this litigation, The Central Railroad Company of Iowa made a contract with the Missouri Car and Foundry Company for the rental and ultimate purchase of two hundred cars. This contract was assigned to John S. Newberry *et al.*, trustees. The rental was paid regularly, according to the contract, for a time, but afterward became delinquent in part. Suit to foreclose certain mortgages made by the Central Railroad Company was commenced in June, 1874, and afterward, on October 16, 1874, a provisional or temporary receiver was appointed therein, and the same person was, on January 7, 1875, made permanent receiver. The two hundred cars above mentioned, being necessary for the successful operation of the railroad, the receiver made a contract, subject to the approval of the court, with John S. Newberry and others, trustees, etc., for their retention, use and purchase. The court approved the contract, and afterward, and on October 21, 1875, rendered a decree, or order for the payment of the amount specified by said contract out of the funds in the hands of the receiver, and made the same a lien paramount to the mortgages. The further special facts will be stated in connection with each point discussed.

I.

The decree was by consent, and hence not reviewable on appeal.

It will be observed that the parties "consent that the interplea of

John S. Newberry and others, duly filed herein, be taken as confessed; and it is so ordered and adjudged." And, also, that the contract "was made with the consent and approbation of the different parties to these proceedings." An examination of the entire judgment entry or decree show that it was by consent. *Consensus tollit errorem* is a maxim of the common law, and the dictate of common sense. Broom's Legal Maxims, 138.

Chamberlin v. People, 93 Mass. (11 Allen), 370.

Wadhouns v. Gay, 14 Am. L. Reg. (1875), 419.

The error in the decree, if any, being "waived," "tolled," or "removed" by the consent, cannot now be made available for the purpose of reversing the decree.

That a decree or judgment by consent is binding and conclusive, unless procured by fraud, see

French et al. v. Shortwelt, 5 Johns. Ch., 555.

Morrell v. Lawrence, 12 Johns., 521.

Winchester v. Winchester, 121 Mass., 127.

II.

There has been no appeal from the decree in favor of John S. Newberry and others, trustees.

The appeal in the main case is taken by Russell Sage, James Buell and N. A. Cowdrey. They were not parties to the original bill, nor were they ever made parties to the proceeding in such way or sense as to constitute them *parties to the action.* The decree in the main case was rendered October 22, 1875. The decree in favor of John S. Newberry and others, trustees, was rendered October 21, 1875. The October term of Court was adjourned over to January 11, 1876. On January 14, 1876, it being still of the October term, the appellants, Sage, Buell and Cowdrey, on application therefor, were "permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their several interests therein, and in their own names, an appeal to the Supreme Court from the *decree* entered herein *on the 22d day of October*, 1875." (Printed Record, page 1206.)

They were not made *parties in full* to the suit; but they were *permitted* to become *so far parties* as to prosecute an appeal from *a particular* order or decree. They have no right here other than that granted them by the order of the court above quoted. They cannot, therefore, claim that they have a right to appeal from the

decree in favor of John S. Newberry and others, trustees, rendered October 21, 1875. That decree is, in itself, not only a *final* decree in its language and terms, but it is also a full and complete adjudication of all the rights of all the parties to the suit, in respect to the claims of the said Newberry et al.

Certainly, it cannot be claimed that a limited and special permission to these persons to appeal from a decree in favor of the Farmers' Loan and Trust Company, rendered October 22, 1875, foreclosing the mortgages, gave also, by implication, or otherwise, the right to appeal from a decree in favor of John S. Newberry and others, trustees, rendered October 21, adjudging a certain sum to be due, and making the sum a lien upon specific property.

An appeal might have been taken from this decree of October 21, 1875, for that it is a *final* decree, and also a full and complete adjudication of all the rights of all the parties in the subject-matter of the claim made by the interplea. But the appellants, in their main case and appeal, did not ask, or obtain, permission to appeal therefrom. Not only so, but they have not appealed therefrom. Their petition for appeal only prays an appeal from the decrees "made on the 22d day of October, 1875, and the 14th day of January, 1876" (that limiting their right as parties). See printed record, page 1210. Further, the citation is, to show cause "why the said order and decree in said appeal mentioned, should not be corrected, etc." (printed record, page 1219). And the appeal bond recites the decrees made on "October 22d, 1875, and on the 14th day of January, 1876," as being the only decrees or orders appealed from (printed record, page 1219). Finally, on this point, no errors are assigned in any way upon the decree in favor of John S. Newberry et al. We submit, therefore, confidently that no review of the decree in favor of the said Newberry et al., can be made on this appeal, because:

1. Appellants have no permission to appeal therefrom.
2. They have not prayed an appeal therefrom.
3. They have not taken an appeal therefrom.
4. They have obtained no citation thereon.
5. They have given no appeal bond therefor.
6. They have not assigned errors in respect thereto.

III.

Upon the merits, the decree is right.

It will be observed that the contract between the receiver and the

owners of the two hundred cars, was made subject to the approval of the court, and was to be, and was, "placed on file in the office of the clerk of said Circuit Court, in connection with said interplea, as constituting a part of the records and proceedings therein, and as forming in part a foundation for an order or decree of the court in respect to said cars" (Pr. Rec., 232, ante 5); and in the decree itself, it will also be observed, that the first finding of fact is that the parties "consent that the interplea of John S. Newberry and others duly filed herein, be taken as confessed." (Pr. Rec., 233, ante 6.) So that in respect to these facts there can be no controversy. The court also finds, upon the evidence submitted to the court at the hearing, the following facts, which are also embraced in the decree, to-wit:

1st. That the two hundred cars mentioned in said interplea have been required for the successful operation of the railroad, and are still so required, and have been continuously in the service of the receiver.

2d. That the receiver, in compromise and adjustment of the claim for the use and service of such cars, had entered into the contract which constitutes the basis of the claim.

3d. That the contract so entered into is reasonable and just, and promotive of the interest of the said railroad company and its creditors.

4th. That the said contract with the receiver was made with the consent and approbation of the different parties to the suit or proceedings.

5th. That said contract is approved, ratified and confirmed accordingly.

The evidence upon which the court based these findings of fact is not, and does not purport to be, embraced in the printed record. The findings of fact, therefore, must here be accepted as true. And the only question presented upon this appeal, is whether the facts stated in the interplea, together with the contract made with the receiver and approved by the court, together also with the facts found by the court as above, justify the decree of the court that the amount due the interpleaders shall be paid out of the assets, property and income of the railroad company in the time and manner provided by the said contract, and that the same shall have priority over the mortgages.

It is the dictate of reason to affirm, where one person furnishes that which is requisite to preserve the property of another and does thereby preserve it, that he is entitled to compensation for that

which he furnished, before any right to the preserved property can arise in the party for whom it is furnished. The ordinary sense of justice in such priority is, as we submit, in accord with the rules of equity recognized by the courts and which have had exemplification in several modern decisions.

In *Cowdrey v. the Railroad company and others*, 1 Woods C. C. Reports, 331, the following language is found, the pertinency of which is sufficiently manifest without a further statement of the facts. We quote from page 336 as follows:

"And it may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. * * * And to such outlays in ordinary course, may properly be referred, not only the keeping of the road, buildings and rolling-stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. * * * In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court, in advance, and obtain its authority for the purchase or improvement proposed."

The case of *Ellis v. B., H. & E. R. R. Co.*, 107 Mass., 1, which is a long case, and for our purpose we need not state the same here in full, but need only remark that the extract which we quote was pertinent to the question before the court. On page 28, Wells, Justice, in delivering the opinion of the court uses the following language:

"The receivers are officers of the court for this purpose, and act under its direction and control. They continue the operation of the road and the conduct of its business, because this is essential to its proper preservation. They may fulfill the contracts of the corporation so far as beneficial. * * * They are entitled to re-payment of their reasonable expenses and charges, *in preference to all other claims* upon the property, of whatever nature."

In *Stanton et al. v. The A. & C. R. R. Co.*, 2 Woods C. C. Reports, 506, the court hold, as is pertinently stated in the head-note, as follows:

"Where a decayed and dilapidated railroad and its appurtenances are in the possession of receivers by authority of a decree of court, made in a cause brought by trustees of first mortgage to foreclose

the same, and it is necessary to borrow money in order to preserve the road and complete some inconsiderable portions thereof, and to put it in condition for the transaction of its business, the court may authorize the receivers to borrow money for such purposes, and make the sum so borrowed *a lien on the railroad property superior to* that of the first mortgage."

In *Kennedy v. St. Paul & P. R. R. Co.*, 2 Dillon, 448, it was held, as correctly stated in the head-note, as follows:

"To prevent a valuable land grant in favor of a railroad company from lapsing, a receiver was appointed, at the instance of bondholders of the company, whose principal security was the said lands, and the receiver was empowered to borrow money to complete the unfinished portions of the road, and his debentures issued for that purpose were made *a lien on the road and lands of the company, prior to all other liens* or claims thereon whatsoever."

In *Douglass v. Cline*, 12 Bush (Ky. Rep.), 608, it was held, not only that it was competent for the court to order that the person furnishing materials necessary to the preservation and profitable use of the property while in the control of its receiver, was entitled to a prior lien therefor, but the court went further and held that the employes of a railroad, who had performed labor and service for the railroad company after it had become insolvent and *before the commencement of proceedings to foreclose the mortgage* and the appointment of a receiver therein, were *entitled to a lien upon the property which their services had protected and preserved, prior to the mortgage* which was existing upon it at the time the services were rendered.

To same effect is *Duncan v. Chesapeake & Ohio Railway Co.*, 9 Am. Ry. Reg, 386. These last two cases are perhaps extreme ones, and yet they have the support of cogent and equitable reasons.

This question as to the right of priority underwent an exhaustive examination in *Meyers, Trustee, v. Johnston and others*, 53 Ala., 237, and we quote from the able opinion of Manning, Justice, pages 347 and 350, the following:

"It was not necessary that the question of the power of a court to authorize the issue of first lien certificates of indebtedness to enable a receiver to raise the money he might need, should be decided before the introduction of railroads. But these properties, with their appurtenances, vast in extent and value, yet very perishable if unused and neglected, existing as the estates of private individuals associated into corporations, but essentially public works, in whose operations the public at large and the State are concerned, when drawn into litigation, must be dealt with by the courts according to the nature and circumstances of the subject. And any one

can understand that the best and cheapest mode of conserving a railroad, may be by operating trains thereon, and keeping it in repair for their use. To preserve its value, it must generally be continued in operation, and sold as a going concern. If it were not for the public quality belonging to them, for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested—unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck.

But the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit, to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require—not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one—but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose, if it can not otherwise do so, in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued *constituting a first lien on the proceeds of the property*, and redeemable when it is sold or disposed of by the court. * * * * Upon the whole, however, it seems necessarily to result from the nature of such property, and the capacity and duty of courts of equity to "adapt their decrees to all varieties of circumstances which can arise, and adjust them to all the peculiar rights of all parties in interest," that if a railroad and its appurtenances are in the hands of a receiver to be preserved and operated, the court having charge thereof, must possess the power, after the notice to and hearing of the parties interested, to allow the issue even of negotiable certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and conservation of the property, until it shall be disposed of. The pressure upon the courts in various portions of the country, to exercise such authority, and the consent or acquiescence of first mortgagees and others in the exercise of it, are persuasive that the power must exist."

To the same effect are the English cases.

In *Morison v. Morison*, 7 De Gex, Macnaghten and Gordon's Reports, 214, the Lord Justice Knight Bruce uses the following language on pages 223–4.

"In the suit receivers were appointed, who also, owing to the nature of the property, became consignees, and every act done by them was an act in the administration of an ordinary trust with respect to money existing at the time not in the shape of money, but in the shape of the investment in which the money was temporarily

lodged. Every act done by them was done with a view to the safety and protection of a fund, which was to be considered as money. * * * Here there is no reason to doubt the good faith of the consignees (receivers). They have been directed to make, or been sanctioned in making, certain payments, and it is too late to go back and inquire as to the propriety of those payments. * * * These payments must be looked upon as payments made in the proper administration of the trust, for the protection and preservation of that which was to be protected and preserved until it should be converted into money. They must be treated as having been in the execution of a money trust, and it is impossible to permit the trust property to be enjoyed by any persons claiming beneficially under the trust without making good the expenditure and advances *bona fide* made in the execution of the trust under the authority of the court, whose duty it was to direct how the trusts were to be executed. It seems to me that what hasbeen done cannot be disturbed."

And the Lord Justice Turner in the same case observed, on page 226:

"The court has represented the whole estate, and has stood in the position of a trustee of it, and the consignee, (receiver,) was the paid agent of the court to manage the estate which was in the court's hands. The moneys due to the consignee are moneys due to the court itself, and as the court has in its hands moneys belonging to the estate, on account of which it has made the payments, it must have a right to repay itself its advances out of these moneys. This right has priority over the costs of suit, for as to a fund in the hands of a trustee his expenses must be the first charge on the fund."

The same case, in its earlier stages, is found in 2 Smale & Giffard, 564, and also in 4 Mylne & Craig, 215.

It seems to us that the reasons presented by the several courts, from whose opinions we have above quoted, are sufficient and satisfactory to sanction the judgment of the court below in this case and to require its affirmance here. At all events, we do not deem it necessary to submit in this printed argument any further reasons of our own.

An affirmance is respectfully asked.

C. C. COLE,

Counsel for John S. Newberry et al., Trustees, etc., Appellees.

Supreme Court of the United States.

Nos. 175 and 570.

RUSSELL SAGE, et al.,

Appellants,

vs.

THE CENTRAL RAILROAD COMPANY OF IOWA, and
THE FARMERS' LOAN AND TRUST COMPANY, Trustee, et al.,

Appellees.

BRIEF

For the Farmers' Loan and Trust Company, Trustee, Appellee.

HERBERT B. TURNER,
B. F. LEE,
Of Counsel.

New York:
BENJ. H. TYRREL, LAW AND JOB PRINTER, 74 MAIDEN LANE.
1879.

Supreme Court of the United States.

RUSSELL SAGE, *et al.*, Intervenors, *Appellants*, *vs.* THE CENTRAL RAILROAD COMPANY OF IOWA, *et al.*, *Defendants and Appellees.*	*Nos.* 175 *and* 570.

BRIEF

For The Farmers' Loan and Trust Company, Trustee,

Appellee.

STATEMENT OF THE CASE.

On the 2nd day of June, 1874, Charles Alexander, and others, filed their bill in the Circuit Court of the United States for the District of Iowa, against The Central Railroad Company of Iowa, and The Farmers' Loan and Trust Company, Trustee, for the foreclosure of three mortgages, all made by the railroad company to the trustee, the first dated September 9, 1869, to secure bonds to the amount of $3,700,000; the second, dated April 15, 1871, to secure bonds to the amount of $925,000; and the third, dated May 15, 1872, to secure bonds to the amount of $500,000, and over.

The bill alleged, among other things, that the complainants mentioned therein were holders of first mortgage bonds, and were a committee appointed by a meeting of holders of first and second mortgage bonds to commence the suit for the benefit of themselves and others similarly situated.

It also alleged the execution of the mortgages, default in the payment of the interest, and a refusal on the part of the trustee to foreclose, after a demand on the part of the complainants for them to do so (Transcript of Record, No. 175, p. 1).

To this bill the Railroad Company demurred, July 16, 1874 (p. 18).

The Farmers' Loan and Trust Company, Trustee, appeared and answered, September 30, 1874, denying the demand for foreclosure, as alleged in the bill, praying instruction, alleging its readiness to foreclose, if so advised by the Court, etc., (p. 40).

The Court overruled the demurrer of the Railroad Company, and, with the consent of the then complainants, dismissed the bill as to the trustee, giving the trustee leave to file a new bill as complainant, which was at once done, October 14, 1874 (p. 42).

This bill was consolidated with the bill filed by Alexander and others, and made the sole bill in the cause, October 16, 1874 (p. 66).

The Railroad Company demurred, January 4, 1875, to the bill filed by the trustee (p. 69).

The trustee amended its bill January 30, 1875, striking out certain unnecessary allegations, and

making certain judgment creditors defendants (p. 74).

The Court overruled the demurrer of the Railraod Company, with leave to answer, March 2, 1875 (p. 75).

The Railroad Company answered, March 25, 1875 (p. 77).

To this answer the complainants filed a replication, March 30, 1875 (p. 80).

During the pendency of the action, four orders or decrees were made for the payment of certain sums of money by the receiver, which orders now form the subject of the intervenors' second appeal, No. 570, which this Court has ordered to be heard at the same time with No. 175. These orders are all dated October 21, 1875, and are as follows:

I.—An order that the receiver pay Horace Abbott and others a certain balance of $44,769.78, with interest from April 1, 1875, due for four locomotives, which Abbott and others had rented to the Railroad Company, with the right to purchase, such payment to be in full for the purchase of the locomotives (p, 89).

The motion states (p. 85) that the petitioners owned the locomotives and leased them to the railroad, October 15, 1873, at a certain rate, and proposed that when the rent and all the payments made should amount to the cost of the locomotives, then the locomotives should become the property of the Railroad Company. A statement is furnished of the entire cost, deducting the amount paid, which shows the above sum to be the balance due (p. 88).

II.—An order that the receiver pay the Mowry Car and Wheel Works a certain balance due for 100 cars, not exceeding $47,031.74 (p. 228).

The petition states (p. 225) an agreement on the part of the Car Company to sell to the Railroad Company 100 cars, on certain conditions, made September 27, 1872, and also shows indebtedness to the above amount.

III.—An order that payment be made of $125,736, with interest, to John S. Newberry and others, (p. 233).

The petition states (p. 229) that the petitioners are trustees of the St. Louis & Northern Car Company, and as such, the legal owners of two hundred cars and the rents thereof; that September 1, 1873, the railroad company contracted with the car company for the hiring and ultimate purchase of the two hundred cars, &c. A contract was filed, (p. 231) made between Pickering, the receiver, and the petitioners, modifying the original contract.

IV.—An order that the receiver pay the Haskell and Barker Car Company a balance due, not exceeding $6,571.18, (p. 252).

The petition states, (p. 248) an agreement made between the car company and the railroad company, for two passenger cars and four baggage cars, &c.

Lewis M. Fisher was appointed a master, May 14, 1875, to report to the Court the amount of bonds issued and outstanding under each of the three mortgages set up in the bill, also whether they were legally and properly issued and sold in the

market for a valuable consideration, also how many bondholders (representing what amount) had expressed a claim for a foreclosure preserving the priority of the various liens as they then were, or might so express their preference before the making of the master's report, and how many had expressed, or might express before said report, a preference for the usual foreclosure and sale for cash, and to report such other and further information as would enable the Court to render a final decree in the cause, (p. 280).

Special Master Fisher, filed his Report and Exhibits, October 11, 1875 (p. 280). He finds, among other things, that under the first mortgage, bonds, to the amount of $3,700,000 were duly issued and sold, at an average of 89 cents and accrued interest, and were held by *bona fide* purchasers; that under the second mortgage bonds, to the amount of $900,000 were duly issued and sold at an average of 75 cents, and were held by *bona fide* purchasers; that under the third mortgage, bonds to the amount of $420,000 were outstanding, which were never sold, but were hypothecated to secure floating debts of the Railroad Company, at the rate of about 60 cents; that default had been made; that certain specified sums were due on the mortgages respectively; that the company had other debts and was hopelessly insolvent; that there were substantially two plans of reconstruction before the bondholders, submitted by the Boston Committee and the New York Committee respectively, and what their main features were, etc. The master also filed a supplemental report, October 15, 1875, (p. 1,079.)

October 14, 1875, the plaintiff filed a petition,

stating that Messrs. Buell, Lake, and Sage had deposited first mortgage bonds, to the amount of $148,500, and had demanded that the trustee procure a foreclosure and sale, and asking advice of the Court, &c., (p. 1,195). The communication from the said bondholders was simultaneously filed by the plaintiff. It is a demand that the trustee instruct its counsel to procure the ordinary decree of foreclosure and sale, and failing to procure the same, appeal to this Court, and if the trustee fail so to instruct its counsel that they be informed, in order that they may become parties themselves, (p. 1,196).

The decree of foreclosure and sale, from which the intervenors now appeal, was rendered October 22, 1875.

The present intervenors then, by letter, dated December 8, 1875, requested the complainant to take an appeal from the decree (p. 1200). They filed an appeal bond, December 24, 1875, in $20,000 (p. 1201).

The Circuit Judge denied the appeal, December 24, 1875, with leave for parties desiring an appeal to apply at the adjourned term of the Court in January (p. 1202).

January 11, 1876, the intervenors filed a petition for appeal (p. 1203).

January 13, 1876, they filed a motion to set aside the decree, with assignments of error (p. 1205).

January 14, 1876, the Court made an order, with a statement of facts (p. 1206), and fixed the bond on appeal in the penal sum of $1,000,000.

The intervenors did not file any bond in that amount.

February 21, 1876, the intervenors filed another petition for appeal, (p. 1209).

The appeal prayed for was allowed by Mr. Justice Miller, February 16, 1876, and a bond in $20,000, was approved by him to operate as a *supersedeas*, (p. 1211).

A motion was filed at the October, 1876, Term of this Court to dismiss the appeal and to vacate the *supersedeas*. The appeal was not dismissed, but the *supersedeas* was vacated.

3 Otto, 412.

The Special Master, appointed by the decree, made the sale as therein ordered, July 18, 1877; and the complainant, the trustee, as directed by the decree, became the purchaser of the mortgaged property, in trust for the bondholders, for the sum of $5,192,390, that being the amount of the first mortgage bonds, with interest, to the date of the sale. The facts appear in the Special Master's Report, filed July 27, 1877, (p. 1, Transcript of Record, No. 570).

The intervenors filed exceptions to the Master's Report, August 25, 1877, (p. 8).

The complainant moved to confirm the sale and approve the deed, August 29, 1877. On the same day the complainant made a report to the Court, that the sale had been made, that it had become the purchaser, that three new corporations of bondholders had been formed and had presented to the complainant their respective articles of association,

and asking to which, if either, of these corporations the complainant should make conveyance, (p. 10).

The intervenors again, August 29, 1878, filed exceptions to the master's report of sale, being in substance the same that they had already filed, and also others (p. 12).

R. L. Ashhurst and others, a committee of bondholders, moved, August 29, 1877, for an order authorizing the trustee to convey to the Central Iowa Railway Company, (one of the three corporations mentioned in the complainant's report as above stated,) the property purchased at the sale, &c., (p. 14).

August 31, 1877, the Court made an order overruling the exceptions of the intervenors, finding as a matter of fact that the sale had been made in strict accordance with the decree, and confirming and approving the same, also ordering the conveyance by the special master of the property sold by him to the complainant, and approving the conveyance which the master had executed and presented in open Court, and ordering it to be delivered to the complainant to be recorded; and also appointing L. M. Fisher a special master to take the written request of the first mortgage bondholders, and their approval or disapproval of the terms, conditions, and limitations prescribed by the new company, to which they should respectively desire the property to be conveyed, &c., (p. 27).

On the same day, the intervenors filed a petition for an appeal from the four orders for the payment of money above recited (p. 26). The appeal was allowed, bond fixed at $1,000, and *supersedeas* re-

fused, (p. 29). The bond was duly filed and approved.

The intervenors thereupon presented a petition for a *supersedeas* to Mr. Justice Hunt, of this Court, with a bond (p. 30), which bond was approved by him to operate as a *supersedeas*, September 17, 1877, (p. 32).

A motion in this Court to dismiss this appeal and vacate the *supersedeas* was denied.

6 Otto, 712.

ARGUMENT.

Mortgages like those before the Court in this suit, are said to be in some respects *sui generis*. They are made by railways, a class of corporations which have received from the sovereign authority high and peculiar privileges, and from Courts the judicial affirmance and enforcement of them. These corporations are not created merely for private emolument, but for the public welfare. Certain franchises, sovereign prerogatives, are delegated to them. The exercise of these franchises is a personal trust. (Messenger *v.* Penn. R. R., 7 Vroom, N. J., 406.) Courts and legislatures have given their aid in the proper exercise of these franchises.

Such corporations are permitted to pledge as security for indebtedness, to be created from time to time, all their corporate property, present and future, these very franchises, their right to exist, their right to build railroads, and everything acquired in pursuance of their franchises to carry them into practical effect.

(p. 1196), they claimed to hold only $148,500. And the intervenors are the only persons whose dissent is known or suspected.

Leaving then the wishes of the junior interests wholly out of view, we have six per cent. in opposition to ninety-four per cent.

Nor is this strange, for the sale for cash which it is supposed the minority desire, would be destructive of the interests of the small holders who constitute the majority.

I.

This Court is not asked to affirm the decree of October 22, 1875, on the ground that it was entered with the consent of the trustee, and that therefore the intervenors are concluded. The trustee gave no such consent, and lest any misapprehension should exist on this point in consequence of anything contained in the statement of the Judges of the Court below, we desire to call the attention of the Court to the facts as shown on the record, and to a few authorities on the subject.

The Circuit Court has included in its order of January 14, 1876, by which the intervenors were made parties for the purpose of prosecuting this appeal in their own name, a statement of facts (page 1207), to the effect that when the decree was rendered the trustee, complainant, and the Railroad Company, and the other defendants, appeared by their respective attorneys, that there also appeared several attorneys for committees of various bondholders, that all the said parties agreed to the

decree as entered, and that the same was not entered upon an independent consideration by the Court of the rights and equities of the various parties. The Court then proceeds to say that the statement that the complainant, the trustee, consented must be taken in connection with certain facts, namely, that when the draft of the decree was presented to the Court by the parties in interest, the trustee's solicitor laid before the Court a communication to the trustee from the intervenors, requesting the trustee to instruct its counsel to procure the ordinary decree of foreclosure and sale, and failing to obtain that, to appeal to the Supreme Court, etc. (p. 1207); that the trustee's solicitor therewith presented to the Court a petition, informing the Court that the intervenors had deposited their bonds with the trustee, and demanded a foreclosure under the first mortgage, and the trustee thereupon asked advice, (p. 1208).

The fact then that these intervenors were first mortgage bondholders, and desired the ordinary decree of foreclosure and sale, and wished to appeal should any other decree be entered, was brought to the attention of the Court by the trustee before the decree of October 22, 1875, was rendered. This is sufficient to repel the idea that the complainant gave any such consent as would bind the intervenors.

Again, the fact that the Circuit Court made the intervenors parties for the purposes of the appeal, shows that it did not intend to hold them concluded by any such consent.

In the following cases, among others, the Courts have expressed themselves very emphatically on the subject of consent decrees.

Jenkins *v.* Robertson, L. R., 1 Scotch Appl. Cases, 117.
Egerton *v.* Muse, 2 Hill, S. C. Eq., 51.
Butler *v.* Van Wyck, 1 Hill, N. Y., 461.

The trustee is not divisible. It could not assent to the decree, on behalf of the holders of the ninety-four per cent. of the bonds, and dissent on behalf of the intervenors. It was obliged to pursue the course which it has pursued throughout the proceedings which have grown out of the insolvency of this railroad—state the facts to the Court, and act under its advice and direction.

II.

The decree of October 22, 1875, is a just and equitable determination of the matters before the Court, and should be in all respects affirmed.

The first mortgage made by the Central Railroad Company of Iowa, contains the following provisions, (p. 729.)

"And it is further covenanted and agreed by and "between the parties hereto, that in case of any "judicial foreclosure sale or other sale of the "premises embraced in this mortgage, under a "decree of any Court having jurisdiction thereof, "based upon the foreclosure of this mortgage, and "the holders of a majority of the then outstanding "bonds secured by this mortgage, shall, in writing, "request the said trustee or their successor, they "are authorized to purchase the premises embraced

"herein, for the use and benefit of the holders of "the then outstanding bonds secured by this "mortgage, and having so purchased said prem- "ises, the right and title thereto shall vest in said "trustee, and no bondholder shall have any claim "to the premises or to the proceeds thereof, ex- "cept for his *pro rata* share of the proceeds of "said purchased premises, as represented in a new "company or corporation, to be formed for the "use and benefit of the holders of the bonds se- "cured hereby; and the said trustee may take such "lawful measures, asdeemed for theinterest of said "bondholders, to organize a new company or corpo- "ration for the benefit of the holders of the bonds "secured by this mortgage. Said new company or "corporation shall be organized upon such terms, "conditions and limitations, and in such a manner "as the holders of a majority of said outstanding "bonds secured by this mortgage, shall, in writing, "request or direct, and said trustee so purchasing, "shall thereupon reconvey the premises so pur- "chased by them to said new company or cor- "poration."

It is very clear that these provisions were especially designed to guard against the disastrous effects which are pretty sure to follow a sale for cash.

Those who drew the mortgage appear to have contemplated with alarm the consequences of a forced sale, and to have endeavored to provide a method by which the bondholders might be facilitated in organizing themselves into a new association to become possessed of the franchises and property mortgaged.

The intention of these provisions plainly is to give to the holders of a majority of the bonds secured by this mortgage, the right to cause a new Company to be organized, in such a manner as they should deem most conducive to the true interests of all, and to prevent any minority from demanding that their wishes should be complied with in preference to those of the majority, or else that they should be paid *pro rata* in cash. The greatest difficulty which bondholders have to contend with in such a case, is a want of unanimity, and the difficulty in providing funds by assessment or otherwise, to pay off non-assenting holders.

Here then was a scheme, carefully devised, by which a majority should settle the "terms, conditions and limitations" of the reorganized company, and the manner of its organization, and the minority be bound by such determination.

Under such agreements and provisions, then, the intervenors became bondholders, and they are bound by them, and by all that may be lawfully done by virtue thereof.

Let us now see what steps were taken by the Court, to carry these provisions into effect.

The Court, by the report of a master, duly appointed, discovered that holders of first mortgage bonds to the amount of $2,372,500, and holders of second mortgage bonds to the amount of $716,000, and holders of third mortgage bonds to the amount of $55,000, being a majority in interest of the holders of the first and second mortgage bonds, had agreed upon a plan of reconstruction (p. 284). It was also represented to the Court, as was undoubtedly the fact, that the plan desired by these bondholders and

their representatives had also, since the date of the master's report, been agreed to by holders of bonds to a large amount, who were at that time in opposition, and that their committee, known as the Boston Committee, had united with the committee representing the majority, and agreed in asking for the decree as signed. Thereupon the Court made a decree on the 22rd day of October, 1875, (p. 1,196,) in the fourth paragraph whereof, after reciting the provision of the mortgage above quoted, the Court went on to provide as follows:

"That for the purpose of carrying out these "promises in said mortgage contained, and in view "of the fact, found by the master and confirmed by "the Court, that the mortgaged property will not "sell in cash for near enough to pay the amount "due thereon, and that the several parties in inter- "est, including the first, second and third mortgage "bondholders, general creditors and stockholders "in said Central Railroad Company of Iowa, have "united in asking the Court to so order the fore- "closure and sale of said mortgaged property as to "preserve the priority of the first mortgage bond- "holders, and, at the same time, permit the holders "of the other subsequent liens and interests, to par- "ticipate in the benefit of such sale and fore- "closure,

"It is therefore further ordered and decreed "that Lewis M. Fisher be, and is hereby appointed "a Master, for the purpose of making and conduct- "ing the sale under the decree, of said mortgage "property, the same to be sold under the provi- "sions of said first mortgage in the bill described."

The Court further provided, in the fifth paragraph:

"That the said Farmers' Loan and Trust Com-
" pany, complainant herein, for the purpose of
" carrying out the agreement of the parties to said
" mortgage, is hereby authorized and directed to
" bid at the sale of said mortgaged property, as
" trustee for the first mortgage bondholders, bid-
" ding thereat at least the amount of principal and
" interest of said first mortgage bonds ; that if said
" trustee, as aforesaid, shall become the purchaser
" of said property at such sale, the title shall pass
" absolutely to said trustee, subject however to
" the trusts herein indicated on behalf of the several
" parties in interest, being the first, second and
" third mortgage bondholders, creditors and stock-
" holders of the Central Railroad Company of
" Iowa ; and said property shall be conveyed by
" said trustee to a corporation organized, or to be
" organized, for the purpose of acquiring said prop-
" erty, under the provisions of said first mortgage
" and of this decree, and to be approved by a ma-
" jority of said first mortgage bondholders, in
" which said corporation, the controlling interest
" and power of management, shall be given to the
" first mortgage bondholders, in such manner as a
" majority of such first mortgage bondholders shall
" indicate and provide ; and in which the second
" mortgage bondholders shall receive a second
" class of stock for the full amount, principal and
" interest, of said second mortgage bonds ; and in
" which corporation the third mortgage bond-hold-
" ers and general creditors shall receive common
" stock at par, for the respective amounts due
" them, and in which the stockholders of the de-
" fendant shall receive common stock at the rate of
" one dollar in the new corporation for every three
" dollars of stock held by them in the defendant
" corporation."

"It is further ordered, that said trustee shall "make full report of its proceedings under this "decree to this Court, and shall submit the convey- "ance to be made to the new corporation herein "provided for, togther with the articles of incorpo- "ration of said company, to this Court, for appro- "val and confirmation."

In this way the Court endeavored to carry out the terms of the mortgage, and especially of that clause of the mortgage to which the particular attention of the Court has been requested, and under which the new company was formed.

But we are told by the intervenors, in their assignment of errors, that the Circuit Court attempted to force different and inconsistent duties and trusts upon the trustee from what the parties in interest had themselves by the trust deed established.

Now let us bear in mind that a majority in interest of the holders of the first mortgage bonds had, prior to the rendering of the decree, organized a new company or corporation to receive the title of the mortgaged premises, exactly in accordance with the terms of the decree, providing in their articles of association, that the different holders of incumbrances against the property should receive exactly the same relative interests in the new corporation as they are given by this decree.

Our contention then is, that under the clauses of the original mortgage, which we have already cited, the Court was authorized to make the decree which it finally made, and by virtue of the decree and mortgage, the majority of bondholdhers were authorized to form such new corporation, and to

bind by their so doing, the holders of the minority of the first mortgage bonds. The new corporation, it was expressly provided by the mortgage, should be organized "upon such terms, conditions and "limitations, and in such a manner as the holders "of a majority of said outstanding first mortgage "bonds secured by said mortgage, should in "writing request or direct."

"*On such terms, conditions and limitations, and in such a manner.*" It seems difficult to find broader and more comprehensive language.

But the intervenors are understood to object, and to insist that new and different trusts are created, mainly on the grounds that junior interests are provided for, and that all the securities of the new company, including both stock and bonds, are not apportioned among the first mortgage bondholders only. It is true that after the first bonds are fully paid, the surplus is devoted, on paper, to the subsequent incumbrancers, but in view of the fact found by the master, that the mortgaged property would not sell for near enough to pay the amount due thereon, and the further fact that there is very little hope that the best management can ever make this road pay the interest on the first mortgage, the grievance of the intervenors seems more fancied than real.

If the majority of the first mortgage bondholders had not power, in their new organization, to provide certain interests for the junior incumbrancers, then the scheme could scarcely be carried out, and the clauses giving them power to reorganize would be almost a delusion. Junior interests must, of necessity, be represented in foreclosure suits, and

their active opposition is one of the strongest barriers in the way of bondholders in effecting reorganization. We must suppose, in construing the power, that those who framed it did not intend it to be so limited in its construction as to be practically a nullity.

We fail then to see the force of the suggestion of the appellants, that the Circuit Court attempted to force different and inconsistent duties and trusts upon the trustee of the bondholders, from what the parties had themselves established by the mortgage deed. And we are greatly surprised at the assertion that there can be no pretense that in this respect the decree follows the deed of trust, and that whatever power the trustee had, after the decree was entered, was conferred by the Court, and not by the deed of trust or agreement of the parties, (Brief p. 13).

Again, the appellants claim that it was extra judicial, and beyond the power of the Court to take cognizance of plans of reconstruction, and cite the case of The Vermont and Canada R. R. *vs.* Vermont Central R. R., 50 Vermont, 593, (S. C. 14 Amer. Railway 497,) which wholly fails to sustain any such position. The learned judge in the opinion in that case does indeed state (p. 551) the plain proposition that the sanction of the Court cannot be held to control or essentially to modify or add to the force and effect which such arrangements would otherwise have. But plans of reorganization are essential for the protection of bondholders in cases of default and insolvency of railroads. On principle it is in an eminent degree proper that a Court of Equity should take cognizance of them. As matter of

fact they do take such cognizance, even enjoining foreclosure suits in pursuance of such plans. A plan of reconstruction was especially approved by the Supreme Court of the State of New York in the case of the Farmer's Loan and Trust Company against the Erie Railway Company, and the receiver was ordered to aid in carrying it out. In the case of the Atlantic, Mississippi and Ohio Railroad, the Circuit Court for the District of Virginia, enjoined and prohibited foreclosure proceedings under any of the mortgages prior to that under which the sale was to take place, in order to aid the junior encumbrancers in perfecting and carrying out a plan of reorganization, and this when the principal of one of the earlier mortgages was actually due. In the Chesapeake and Ohio case, the Court exerted its power in various ways, requiring only small payments of money, and giving long credits for so much of the purchase-money as represented the prior indebtedness, and ordering a sale under all the mortgages, and the execution of a new trust deed, to secure that portion of the purchase-money for which credit was allowed.

Yet it is hardly necessary to defend these powers of Equity in the case at bar, for the Court has not exercised them. It has merely followed the course prescribed by the deed of trust.

III.

A few points made by the appellants in their brief, and which have not been touched upon herein, will now be considered.

1.—The fourth assignment of error is to the ef-

fect that the sixth paragraph of the decree is erroneous, as discriminating in the terms of purchase in favor of the complainant.

The paragraph in question provides that if any party other than the complainant should become the purchaser, he shall deposit a certain sum as earnest-money, and in case of his failure to do so, the property shall be again put up for sale.

Practically, such a course is pursued at every foreclosure sale. If the plaintiff purchases, he is not compelled to go through the form of paying the consideration to the Master and receiving it back again. There was no necessity of any earnest-money being paid by the complainant when purchasing for the benefit of those interested, and the provision is wise and proper.

2.—The eleventh assignment of error is to the effect that the decree is not responsive to the prayer of the bill of complaint.

The bill (p. 42) sets forth the facts very fully, annexes and refers to a copy of the mortgage, and finally prays the usual relief in such cases, with the ordinary prayer for other and further relief.

The decree grants the relief prayed for, and directs the purchase to be made by the trustee, in furtherance of the agreement of the parties contained in the mortgage, which is a part of the complaint.

3. The appellants fall into the singular error of supposing that the stockholders are the debtors (p. 16, Brief). The debtor is the corporation, and the corporation is barred and foreclosed of all equity of redemption in the usual way.

4. A point is made as to the advertising (p. 18 brief). The decree originally ordered the sale to be advertised in the "Financier and Des Moines Register." During the pendency of the first *supersedeas*, which was vacated by this Court, the Financier became merged in "The Public," and both papers were published under the latter name.

This appearing to the Court, it made an order, June 8, 1877 (erroneously printed January 8,) that the notice be printed in "The Public," with the same effect as if its name had not been changed.

The appellants claim that this order was a nullity. It seems immaterial whether it was or not. If the Financier was merged in the Public, the advertisement in the Public was a sufficient compliance with the terms of the decree, without any order. If there was no such paper, and the Financier had ceased to exist, the provision of the decree in respect to it was a nullity, and the publication in the Public was not required. Publication in one paper is sufficient.

IV.

But, if for any reason the Court should consider that the appellant has just cause for complaint in that junior interests have been admitted to share with them in the benefit of the new corporation, though such privilege is, in fact, scarcely more than nominal, it by no means follows that the necessary alternative is a reversal of the decree or a sale for cash.

For a Court of Equity will always grant relief

against the defective execution of a power created by a party, although they will not relieve against the defective execution of a power created by law.

Bright *v.* Boyd, 1 Story's C. C. 478.
Pratt *v.* McCullough, 1 McLean, 69.

The Court will then correct any error into which the Court below may have fallen, especially when, as in this case, the defect, if it exist at all, is not in the execution of the power, but by way of excess.

"Where there is a complete execution of a power, and something improper is added, not authorized by the power, the execution is good and only the excess void."

Wallace *vs.* Howell, 3 Wash. C. C., 12.

If there is error, it is because of the provisions made for the benefit of the junior interests. The decree so far as executed, that is by the sale to the trustee under the power, is clearly good and valid in execution of the power. The Court will merely modify the provisions of the trust, under which the conveyance is to be made, and the terms of reorganization, so that the purchase should be for the benefit of the first mortgage bond-holders only.

But the Court will make no such modification on behalf of the ninety-four per cent. of assenting bond-holders. They do not desire it, and no appeal is taken by them, or on their behalf. If equity can be done to the intervenors without disturbing the others, the Court will pursue that course.

And there is such a course that can be pursued. An arrangement can be made, if the Court should so direct, whereby the intervenors can receive, in addition to the provisions made for their benefit in

the decree, a proportion of the stock provided for the junior interests, which shall bear the same ratio to the entire issue of such stock as their bonds bear to the entire issue of first mortgage bonds.

In this manner all the injury they complain of will be rectified, and the others interested will adjust the nominal loss among themselves.

In the case of the Mobile & Ohio Railroad (Ketchum *vs.* Duncan) this Court made an order on a motion to rescind an order suspending the operation of the *supersedeas*, ordering that the Circuit Court proceed with the execution of the decree appealed, upon the filing of a bond conditioned to pay the appellants the difference between the amounts which they would receive from the proceeds of the sale, in case certain disputed coupons were disallowed as part of the mortgage debt, and the amount they would receive in case the mortgage property should be sold and distributed under the decree as it then stood.

V.

The Decree of the Circuit Court, bearing date, October 22, 1875, should be in all respects affirmed.

HERBERT B. TURNER,
B. F. LEE,

Solicitors for Appellee, Farmers' Loan and Trust Company, Trustee.





In the Supreme Court of the United States.

Sage et al.		
vs.		SS. 175.
Central Railroad Company of Iowa et al.		

COUNTER-STATEMENT OF APPELLEES.

The case arises on appeal from a decree made by the Circuit Court of Iowa, for a foreclosure sale to carry out a special clause in the mortgage, by which the Farmers' Loan and Trust Company was made the trustee, and which mortgage was a first lien upon the premises. The amount due under the mortgage on the 15th of October, 1875, for the principal and accrued interest, was $4,623,334.99 gold. There was also a second mortgage, under which the said Farmers' Loan and Trust Company was also trustee for the bondholders, and the amount due under this latter instrument was, on the 11th of October, A. D. 1875, for prinpal and accrued interest, $1,136,246.86. There was further yet a third mortgage, under which $420,000 was found to be due on the 15th of October, 1875. The original bill for foreclosure was filed by Charles Alexander and other bondholders, who are now among the appellees and bondholders assenting to and supporting the decree; but

afterwards, the Farmers' Loan and Trust Company having filed, on the 14th of October, A. D. 1874, their bill for the foreclosure and sale of the said mortgaged premises, by reason of default in the payment of accruing interest, the first bill of Alexander and others, and the trustees' bill were consolidated or merged together (page 66, record). In the course of such proceeding the court appointed, on the 16th of October, A. D. 1874, D. N. Pickering provisional receiver (page 66 of record), to take charge of the property, income, profits, and earnings of the railroad. By the terms of the order making the appointment, the receiver was not to pay any money except for operating expenses, unless by special order of the court. On the 7th of January, 1875, the court duly appointed said Pickering receiver, with all powers appertaining thereto, and directed him to give a bond in fifty thousand dollars, which was done (page 70 of record). Subsequently, on the 17th of January, 1876, J. B. Grinnell was appointed receiver in place of the said Pickering.

Various proceedings took place in the cause, and on the 21st of October, A. D. 1875, the court made several orders before the final decree. These orders were for the payment of certain claims for debts entitled to specific liens and contracted by the receiver in running the road. The final decree was entered on the 22d of October, 1875, and no appeal was taken from any of these orders by the appellants, except as hereinafter mentioned. In fact, the decree itself expressly directs the sale, reserving the rights of all such parties. Subsequently, after the confirmation of the sale, August 31st, 1877, nearly two years afterwards, the appellants, Russell Sage *et al.*, having been admitted by the court to intervene as *cestuis qui trustent* for the purpose of taking an appeal, appealed from four certain orders or decrees of the 21st October, as above mentioned (pages 234, 89, 228, and 252 of record), made on behalf

of these creditors, after due hearing and proof. They were really directions to make these payments as part of the running expenses of the road. One of them is as follows:—

Farmers' Loan and Trust Company

vs.

The Central Railroad Company of Iowa, the Mossy Car and Wheel Works, Petitioners.

Page 228 of record.

It is ordered herein that the balance due the above petitioner for the one hundred cars mentioned in his petition, not exceeding forty-seven thousand and thirty-one dollars and seventy-four cents, as principal, be paid by the receiver to said petitioners, from time to time, as the earnings of the road and the State of the funds in his hands may, in his judgment, warrant.

(Signed) JOHN F. DILLON,
Judge.

The articles of agreement accompanying this petition (page 227) showed that it was expressly agreed between the railroad company and the petitioners that the title to the cars was not to pass until the notes which had been given for them had been paid. There was a further provision that in case of default in the prompt payment of fifty dollars a month upon each car, the petitioners were authorized to resume possession of said cars and sell the same. Considerable payments on account had already been made. It was in order that these cars might be kept in use on the road that the payment of this balance was directed.

The order to pay Abbott, Kensett *et al.*, is in similar terms, and was for the payment of the balance due the petitioners for four locomotive-engines, held on similar terms. (Page 89 of record.)

The order to pay the Haskell & Barker Car Company was for a balance due for cars held in a similar manner. (Page 252 of record.)

The order in the case of J. S. Newberry *et al.* was to carry out a contract made by the receiver for the compromise of a claim of the petitioners for two hundred cars, and was expressly found by the court to be reasonable and just and promotive of the interest of the railroad company and of its creditors, and that the same was made with the consent and approbation of the different parties to these proceedings, and that it was a legal and valid claim created by the proper and legal act of said receiver in the due administration of his office, under the order and direction of the court. (Page 234 of record.) There was a similar order (page 223) for payment to the Missouri Car and Foundry Company, which does not seem to have been the subject of exception or appeal. It was clearly right, for the same reasons which made the others proper.

The day after these orders were made, on the 22d of October, A. D. 1875, the court made the decree ordering the sale of the premises. This decree was made upon the pleadings, the proofs taken, and the reports of the master, Lewis M. Fisher. The decree is set forth at length on pages 1196–1199 of record, all parties being present by themselves or their attorneys, and agreeing to the decree, as subsequently stated by Judges Dillon and Love. (Page 1202 of record.)

The report of the master will be found on page 280. It fully set forth the action of the bondholders with regard to the special clause in the mortgage for a purchase by the trustee for the purpose of re-organization, under which the decree was made.

On or about December 24th, 1875, an application for an appeal was made by complainant, so far as it affected the interests of Russell Sage, James Buell, and N. A. Cowdrey. This application was refused by Judge Dillon, on the ground—(1) That it was a decree made by consent; (2) that it was on behalf of bondholders to the extent of $200,000 only; and (3) that the bond offered was too small in amount. (Page 1202 of the record.)

Subsequently, on the 11th of January, 1876, the same persons filed their petition, praying for leave to intervene in their own right in the prosecution or defense of the action, as the court may deem most proper for the protection of their interest, and on the 14th of January, 1876, the court made an order permitting them to become parties to the suit to prosecute, if they so elect, for the protection of their several interests therein, an appeal to the Supreme Court of the United States (pages 1202–1208 of record), but requiring a bond in the sum of $1,000,000 to operate as a *supersedeas*.

The decree made by the court, and which was appealed from, appears, as above mentioned, upon page 1196 of record. It is the ordinary decree for a foreclosure sale. By clause seven (page 1199), the right of redemption is reserved for one year to all persons interested, for one year from the date of said sale. By clause eight (page 1199), the right of any person claiming liens prior to the first mortgage was reserved, the purchaser to take the title subject to the rights and equities of said parties as the same might be established and declared thereafter by this court. By paragraph four of said decree, it is provided as follows:—

"*Fourth.*—The court further finds that, with a view to prevent a sacrifice of the mortgaged property, by a forced sale, in case of default, it was expresely agreed and stipulated in said first mortgage or trust deed, that in case of judicial foreclosure sale of the mortgaged property, under

decree of the court, upon request of a majority of the bondholders, the said trustee should purchase the premises in the mortgage described, for the use and benefit of the bondholders, and that, upon such purchase, the title of said property should vest in said trustee, and that no bondholder should have any claim on the premises or to the proceeds thereof, except as to his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed and organized, upon such terms, conditions, and limitations, and in such manner as the holders of a majority of said outstanding first mortgage bonds, secured by said mortgage, should in writing request or direct.

"That for the purpose of carrying out these premises in said mortgage contained, and in view of the fact found by the master, and confirmed by the court, that the mortgaged property will not sell, in cash, for near enough to pay the amount due thereon, and that the several parties in interest, including the first, second, and third mortgage bondholders, general creditors, and general stockholders in said Central Railroad Company of Iowa, have united in asking the court to so order the foreclosure and sale of said mortgaged property, as to preserve the priority of the first mortgage bondholders, and at the same time permit the holders of the other subsequent liens and interests to participate in the benefit of such sale and foreclosure, it is, therefore, further ordered and decreed, that Lewis M. Fisher be and is hereby appointed a master for the purpose of making and conducting the sale under the decree of said mortgaged property, the same to be sold under the provisions of the said first mortgage in the bill described.

"The said sale to be made forthwith, in default to pay, as herein decreed, at the front-door of the county court-house, in the city of Marshalltown, Iowa, four weeks' notice of the time and place of said sale to be given by said master, by publishing notices thereof in the *Financier*

New York, and in *Des Moines Register*, and one newspaper published in Marshalltown, Iowa. That such property be sold to the highest and best bidder; and that the master make full report of his proceedings to this court, for its consideration and approval. The said sale so made by said master not to be deemed final until approved by this court."

And the fifth paragraph is as follows:—

"*Fifth.*—That the said Farmers' Loan and Trust Company, complainant herein, for the purpose of carrying out the agreement of the parties to said mortgage, is hereby authorized and directed to bid at the sale of said mortgaged property, as trustee for the first mortgage bondholders, bidding thereat at least the amount of principal and interest of said first mortgage bonds.

"That if the said trustees, as aforesaid, shall become the purchasers of said property at such sale, the title shall pass absolutely to said trustees, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second, and third bondholders, creditors, and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustees to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage and of this decree, and to be approved by a majority of said first mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders, in such manner as the majority of such first mortgage bondholders shall indicate and provide, and in which the second mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second mortgage bonds; and in which corporation the third mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in

which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant's corporation.

It is further ordered that said trustee shall make full report of its proceedings under this decree of this court, and shall submit this conveyance to be made to this new corporation herein provided for, together with the articles of incorporation of said company, to this court, for approval and confirmation."

$100,000 from any party, other than the trustee complainant, was required to be paid at the time of sale.

The parties having failed to give the *supersedeas* bond required by Judge Dillion, subsequently, February 16th, 1876, a petition was presented to his Honor, Mr. Justice Miller, praying for an appeal. It was by him allowed, together with a *supersedeas* bond for $20,000. The *supersedeas* was subsequently set aside by this court (Sage *vs.* Central R. R. Co., 3 Otto, 412), but the appeal was allowed to stand so far as necessary for the protection of their interests.

Subsequently, the *supersedeas* having been vacated, the proceedings went on for the sale of the property. An order was made that inasmuch as the *Financier* had been merged in the *Public*, notice should be put in that paper with the same effect as if inserted in the *Financier*. (Page 1 of record October, 1877, No. 570 on list.)

The sale was made by L. M. Fisher, master, under the decree of the court, on the 18th of July, A. D. 1877. Exceptions were filed to the master's report of the sale by N. A. Cowdrey and others, the appellants (1) alleging the failure to advertise in the *Financier* (an impossibility), and (2) that the bid to the trust company, complainant, was an unauthorized bid, without authority from the deed of trust or from the *cestuis qui trustent*; that no money had been paid on said bid, &c. (Pages 8 and 9 of record.)

As will be seen on pages 11 and 12, August 29th, 1877, the appellants asked to have the property conveyed to a corporation organized by them, called the Iowa Central Railway Company, and on the same day filed exceptions to the sale, which were substantially the same as those filed to the master's report (see pages 12 and 13 of record), except the third, which objects to the sale because nothing is said about the order giving priority to certain claims and apparently, though vaguely expressed, to the reservation of rights of others, provided for by paragraph eight of the decree.

On the same day, August 29th, 1877, there was another application to have the property conveyed to another corporation organized by first mortgage bondholders, called the St. Louis, Iowa and Minnesota Railroad Company. (Page 15.)

And, on same day, articles of incorporation were filed and application made for conveyance to the Central Iowa Railway Company, a corporation organized by these appellees to meet the provisions of the decree. (Pages 18–22 of record.)

On the 31st of August, 1877, the court overruled the exceptions to the master's report and confirmed the sale. (Pages 26–29 of record.)

The decree provided that L. M. Fisher should be appointed commissioner for the purpose of taking the requests in writing of the first mortgage bondholders and their approval or disapproval of the terms, conditions, and limitations by the new company, to which they shall desire the property to be conveyed; that this plan or article of incorporation should be submitted to them and the vote, approval, or request taken by the commissioner.

And the decree further provided (page 29 of record):—

"In respect to the motion allowing the payment of the debts of the Central Railroad Company of Iowa, contracted by the receiver or incurred during the pendency of this

action, in certificates of indebtedness in installments of six, twelve, and eighteen months, with interest at eight per cent. per annum, which certificates shall be secured by being made the first and permanent liens upon the property, the court finds that it is not necessary to enter such order at this time, but the court does find the necessity for some such provision exists, and upon examination the plan proposed by the order seems to the court unobjectionable, and unless some special cause shall be shown against said order, the same or some other suitable provision will be made of record concurrently with the order for the conveyance by the trustee to the new company, and the transfer and delivery of the possession of the property, books, assets, &c., to said new company."

The application for an appeal by Russell Sage *et al.*, the appellants, only from the foreclosure decree, was allowed on the same day, but the demand for a *supersedeas* denied.

This was subsequently granted by his honor Mr. Justice Hunt, on the 17th of September, A. D. 1877. (Page 32 of record.)

The assignments of error appear on page 33 of this record. They are confined substantially to errors, assigned to the first decree, except the third and fourth assignments. The third assignment is taken, it may be inferred, under the appeal from the orders of October 21st, 1875, directing the receiver to pay the claims therein mentioned.

The fourth assignment is in reality a repetition of the fifth assignment filed under the appeal from the original decree, but is somewhat more definite in form.

The questions arising on the different appeals have been thus stated together, because, in reality, the questions involved are identical.

ARGUMENT.

There are several matters involved in these appeals; but a preliminary one requires consideration, as it will to

some extent affect the right of the appellants to raise the questions involved in the various assignments of error.

(1.) Have the appellants any right to be parties to this cause for the purposes of an appeal? And, if so, how far does that right extend?

Even if it be assumed that the court below had the power to admit the present appellants as parties to this cause for the purpose of taking an appeal so far as it was necessary for the protection of their interests, and if the refusal of this court to dismiss the appeal in Sage *vs.* The Railroad Company, 3 Otto, 416, for the purposes of this argument, be treated as conclusive on that point, it seems to us clear that under that appeal the appellants can not raise the questions sought to be assigned for error. In the opinion in that case, however, the Chief Justice said (page 419):—

"Under this authority their appeal has been allowed and perfected. Whether this brings up the whole of the case or only a part, it is not necessary now to consider. It is clear that these parties have been allowed their appeal, and that the case is here to the extent that it is necessary for the protection of their interests. It is their separate appeal within the rule as to the form in which a severance may be obtained, which is laid down in Masterson *vs.* Herndon, 10 Wall, 416."

Ordinarily, in a case of this kind, it will not be contended that the bondholders are necessary parties; nor that the *cestuis qui trustent* would not be bound by the decree, unless it is impeached for fraud or collusion. This has been repeatedly settled and has been applied in cases of railroad mortgages where a trustee holds for the benefit of the bondholders.

Suydam *vs.* Williamson, 20 How., 427.

In Kerrison *vs.* Stewart (3 Otto, 155), the court says:—"If a trustee has been made representative of his beneficiaries it is well settled they are not necessary parties to a suit by him to enforce the trust. In such cases, the trustee

is in court on behalf of the beneficiaries, who, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion with adverse party. The principle underlying this has always been applied in proceedings relative to railroad mortgages where a trustee holds security for benefit of bondholders."

Shaw *vs.* Norfolk Co. R. R., 5 Gray, 162.

N. J. Co. *vs.* Ames, 1 Beasley, 507.

That the trustee is the proper party and that his acts would bind the *cestuis qui trustent* may, therefore, be assumed, and has expressly been decided by this court in this case when brought up in another form. (4 Otto.)

It is further to be considered that in this case the bondholders, viz., Alexander *et al.*, who were the original plaintiffs before their bill was consolidated with that of the trustees, consented to the decree, and they are now appellees sustaining the same.

Where, however, the trustee or the person having the legal title is acting in such a manner as to defraud the *cestuis qui trustent*, the court will allow them to be made parties so far as it may be necessary for the protection of their interests. As was said by this court in Bronson *vs.* La Crosse Railroad Company, 2 Wall, 302:—

"It is insisted, however, that the directors of this company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and hence the necessity as well as the propriety and justice of permitting the defense by a stockholder in their name.

"Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless, but in such a case, the court in its discretion will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or alleged claims against the company; and he will also be permitted to appear on behalf of other

stockholders who may desire to join him in the defense. But this defense is independent of the company, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding and may be enforced. It is true, the remedy is an extreme one and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice and may be the only remedy to prevent a flagrant wrong."

In Masterson *vs.* Herndon, 10 Wall, 416, it was held that when the decree is joint, all parties must join in the appeal; but it was stated that when one of the parties upon request refuses to take the appeal the other would be allowed to do it.

In no case, however, has it ever been pretended that the appellant in a case like this would be allowed to be made a party, except to act *pro interesse suo*, and the intimations in both Bronson *vs.* La Crosse Railroad and Sage *vs.* The Railroad Company are clearly to the effect that he would not.

(2.) Considering, therefore, the appellant as having the right to that extent, and no more, how could $200,000 of bondholders (or $142,000, which the proceedings show to have been the holding of appellants at that time) ever be allowed to attack a decree made by the court under the construction placed by it upon a clause in the mortgage unless they allege or prove facts which would amount to collusion or fraud on the part of their trustee? If in every case, when a few of the bondholders desire to attack a decree, consented to by their trustee, and duly made in open court, after a long litigation, they are allowed to be made parties, to take an appeal, and to be heard on all conceivable technical objections, when is the right to end, and what decree will ever be safe? In fact, what limit can be placed on the danger that would ensue if one having

an interest, but not a necessary party, can lie by, with full information, without applying to be made a party, until after decree has been made, and then, if dissatisfied, appeal, even on technical grounds, from the decree which he has never taken the trouble to shape. The advantage of the strict rule, that no one, not a party, at the time of decree, can appeal from it, is at once apparent, and, if any real injury has been done, it would not be remediless for a bill of review, or original bill, in nature of a bill of review, would give a full remedy, and from any decree in such bill, he would have his right of appeal. The opinion of this court in 3 Otto shows distinctly the defendants' *laches*.

Out of the delay of litigation enough trouble arises. But this is known by lawyers to be unavoidable. When, however, to the delays inseparable from ordinary legal controversy, is superadded the possible accumulation in every case of innumerable parties who may be waiting for their own purposes to detect flaws in the proceedings, and thereby raise a new controversy, they would be insufferable. The appellants' position here is an ample illustration of this. The decree was made over three years ago. The sale under it was not made, owing to delays interposed by the appellants, until July, 1877, and it was by the terms of the decree, made for the benefit of the first mortgage bondholders, and yet, to-day, no conveyance has been made under it, and everything has been kept in *statu quo*, owing to a subsequent appeal, taken by these very same parties, alleging the very same grounds substantially as those taken in the first appeal. No fraud or collusion, no want of information, has been or could be pretended. A decree, assented to by their own trustees, in the interest of peace, and to avoid controversies; a decree, which, by the rights it conceded to second mortgage bondholders, more imaginary than substantial, avoided all practical difficulties in the way of redemption from adverse parties (although to

conform to the Iowa statute their right was expressly given by paragraph 7 of the decree), is sought to be set aside, because certain minor interests have been allowed by the trustee and the court subordinate privileges. The first mortgage bondholders are to have the controlling interest and power of management in the corporation, to be formed in such manner as the majority of them shall indicate and provide.

Further, it is quite clear from the statement made by the judges of the court, and found in page 1202, that this was, in effect, a decree by consent.

No principle of law is clearer than that a decree by consent can not be appealed from, and this notwithstanding that the appellant was misrepresented in his consent being given. His remedy then being by bill of review.

Nowhere is this more clearly shown than in Terry *vs.* The Bank (2 Otto, 454), where the court says:—"The foundation of the appeal is that the case has been deserted and a decree entered in violation of express instructions, but the motion could not be considered. If appellant desired to place his case where the court could review those acts, he should have filed a bill of review, supported by affidavits. As it stood, his motion was unsupported by anything but his own affidavits. So, as to alleged errors in Master's report which were not filed till after confirmation and a final order of distribution, the court can not review these reports on exceptions taken after that and urged here on appeal. If, as alleged by appellant, he was defrauded by counsel, he must sue them for what he has lost by their fault. If he desires to set aside the decree, on account of fraud, the proper remedy is by bill of review."

The case of Pacific R. R. Co. of Missouri *vs.* Ketcham, 5 Otto, enforces the same principle. There the court say:—

"Appeals in equity are heard upon pleadings and proof in court below. No new evidence can be adduced and pleadings can not be amended in this court. In this case, pleadings

fail entirely to disclose defense which appellant now seeks to make, and it does appear, affirmatively, that the original decree was by consent. Although the sale was, in form, to attorney of appellant, it was, in reality, to bondholders, in whose interest foreclosure was had. No irregularities in sale itself, except this, are now complained of, and none whatever were insisted upon below." And we would also refer, in this connection, to Thompson *vs.* Maxwell, 5 Otto, 391.

Here there was no such case as in Terry *vs.* Bank. The utmost that could be alleged was that the trustees rightly used their own discretion instead of obeying instructions of a few bondholders who chose to write to the trustees, instead of intervening, as they should have done, prior to decree.

There was no obligation, whatever, on the trustee to comply with these instructions, and they were right in consenting as they did to the decree desired by the majority of their *cestuis qui trustent*. The trustees' error has been since in too much consulting the wishes of the appellant minority. Even had the trustees had no discretion and been bound to represent the caprices of all the bondholders, yet after decree was entered appellants' only remedy would have been a bill of review. Even if the case were different from what it is, in the matter of consent, it would not help the appellants, for the decree is based on the master's report, to which there are no exceptions, and which can not, therefore, be assailed.

It is not denied that these appellants have a remedy against the trustee, if it is acting fraudulently. Without, however, some such allegation, they ought not to be heard here, and then only so far as it would be necessary to protect their interests from a fraudulent attack upon them. Assuming, however, that they can be heard at all, what are their grounds for attacking the decree?

1. It is alleged that the court erred in making the orders directing the payment of certain preferred creditors on the 21st of October, 1875. Now, if the mortgaged premises were to be sold as an entirety, the propriety and justice of these orders is unassailable. If any portion of the premises proposed to be sold as one be incumbered with a lien, the purchaser must assume the lien, or the lien be paid from the price. Now, owing to the peculiar form of purchase provided for under the form in the mortgage, there was no alternative to an assumption of the liens on the cars, locomotives, &c., by the purchasers. Further, the wisdom or unwisdom of the inclusion of the property covered by these liens in the property to be sold under the mortgage, and the sale of the whole as an entirety, and not in parcels, is hardly the subject of appeal, since such matters are considered and treated as a matter of sound discretion.

This discretion a court of equity is bound to use within the terms laid down in the mortgage to make the mortgaged premises bring the highest and best price—and such discretion can not be the subject of review.

Suppose it were now even to be shown that in the three years since October, 1875, the decline in value of cars and locomotives had become so great that it would be for the interests of purchasing bondholders to forfeit the amount paid on the purchases, and return the cars and locomotives and purchase new ones. Would this or could this be a ground for reversing the discretion of a chancellor exercised at the time of decree, including this property with the mortgaged premises in the foreclosure? Clearly the only remedy, if the chancellor erred in this exercise of this discretion as to mode of sale, would have been a bill of review, in which such facts as might have, if raised, changed his judgment as to the manner and extent of foreclosure would have been set forth.

And if the power contained in the mortgage for a purchase by the trustee for the bondholders was to be exercised at all, it was absolutely requisite that the entire

premises, estate and property conveyed by the mortgage, should be sold as an entirety.

The orders complained of can also be sustained as made for payment of the liabilities of the receiver. When the court appointed a receiver and took possession of the road and appurtenances, including its rolling stock, a part of the property coming into its hands were the very cars, locomotives, &c., which were subject to these special agreements, to carry on the working of the road; and as the receiver had, as found by the court, been obliged to use this rolling stock, but had, until this order, made no payments of installments, the installments or rental falling due during the receivership were certainly receiver's obligations, and there was no alternative as to the whole contracts, but for the court to order the receiver either to carry them out or to surrender the articles. In its good discretion, the court chose the former alternative. In the present case the liabilities it provided for were very moderate in amount, are, apart from their being contracted by the receiver, their lien was established.

But it seems to us clear that, as debts contracted by the receiver under the order of the court, the same were entitled to priority, apart from any other question with regard thereto.

While recognizing fully the great dangers possible to property from the application of this principle, which subsequent events in the history of this road not now before the court forcibly illustrate, we yet see no other possible legal conclusion than that the debts contracted by the receiver in the operation of a road rightly in the hands of the court under process must, from the very nature of things, be a lien prior to any involved in the proceedings before the court. That is, while if the foreclosure is on a second mortgage leaving the first undisturbed, the receiver's debts would be prior only to the

second mortgage; in a proceeding on the first incumbrance, their priority must be absolute. On principle, this seems perfectly clear—the holders of the first incumbrance have come into equity seeking its aid, thus submitting themselves to the cost and responsibility of the process of that court, and the receivership is but an outgrowth of the court and its officers, and its debts and liabilities of the costs of suit. The possible enormous charges that may thus acquire priority over vested interests is a strong argument for prudence and caution on the part of courts of equity in the exercise of such powers and for a strict control by such courts over the expenditures of receivers, and possibly the case is one where legislative interposition for the regulation of this power and the prevention of its possible dangers is called for; but that the receiver's obligations, duly authorized, must be adjudged a prior and paramount lien with the limitation mentioned above can be questioned neither on principle or authority. We may briefly refer to a few out of many cases where they have been thus recognized.

Stanton *vs.* Alabama & Chattanooga R. R., 2 Woods, 506.

Kennedy *vs.* St. Paul & Pacific, 2 Dillon, 448.

Meyer *vs.* Johnston, 53 Ala., 237.

It seems also to have been already decided by this court that there is no appeal as regards these orders of October 21st. (Sage *vs.* R. R., 6 Otto, 712.) They were not made the subject of first appeal, and the court has decided the second appeal can not apply to them.

2. Another ground assigned for error is the substitution by the court by a special order (page 1 of smaller record) of the *Public* newspaper for the *Financier*, in which among other journals it has by the original decree been ordered that the sale should be advertised. The reason, propriety, and even necessity of the change were obvious—in fact there was no change, except in name, the *Public* having been merged in the *Financier*. It would seem almost useless to

cite authority to show that such a change was in the discretion of the court below, and not the subject of error or appeal; but we may briefly refer to—

Tilton *vs.* Cofield, 3 Otto, 163.

"Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually to permit or refuse rests in the discretion of the court, and the result in either case is not assignable for error. This subject was fully examined in Tiernan's Executors *vs.* Woodruff, 5 McLean, 135."

"It has also been held upon full consideration that 'courts have the power to amend their process and records, notwithstanding such amendments may affect existing rights.' Greene *vs.* Cole, 13 Ired. Law, 425."

And The Tremolo Patent, 23 Wallace, 518.

3. Another class of appellant's assignments of error relate to the question of redemption under the statutes of Iowa.

The additional assignments seem to assert that these rights are denied by the decree. It is hard to see how this assertion can be made, since by the express provisions of the seventh clause of the decree the rights of redemption are expressly preserved. Although it might seem by the tenor of the first paragraph that it was the intention of the decree to deny any right of redemption, yet the general language of the first paragraph must be overborne by the direct and positive provisions contained in the seventh paragraph.

Further, we contend that even if the case stood on the first paragraph alone, the appellants would have no ground of complaint, and could not sustain their apeeal on this ground.

a. The appellants are first mortgage bondholders, and can have no interest in redemption. If any parties could complain of the alleged denial of this right it would be the stockholders or subordinate creditors. They are not appel-

lants. The provision made for them by the wise discretion exercised in the fourth, fifth, and sixth paragraphs of the decree has obviated the possibility of any of them claiming the right of redemption, and all the difficult questions which might arise on their attempted exercise of such a right disappear by their ready acceptance of the subordinate interests supposed to be given them. It would be extraordinary if, when the stockholders and subordinate creditors consented to the decree, willingly waiving any right of redemption in consideration of the other privileges given them, some of the first mortgage bondholders could be heard to complain that the right of redemption was not rigorously maintained against themselves.

b. The laws of Iowa as to redemption can have no relation or application to such property as a railroad, when the vital thing sold is the franchise to which real and personal property are both attached.

The statutes of Iowa relate clearly to real estate only.

This distinction is so well and clearly set forth in the recent decision of Mr. Justice Harlan, in the case of Turner *vs.* Bloomington and Western R. R., decided in the Circuit Court for Northern District of Illinois, and the District of Indiana, that it is quite sufficient for the purpose of this argument to make a few extracts from the report of his decision.

The decree in that case was—

"And it is further ordered and decreed that the said mortgaged property be sold without appraisement and without reference, and not subject to any law or laws of the State of Illinois or Indiana conferring rights of redemption from mortgage sales."

The terms of the statutes of Illinois and Indiana do not differ from the Iowa statute in any essential point. The recent decision of this court, in Brine *vs.* The Insurance

Company, was before Mr. Justice Harlan, and fully considered by him, and determined not to apply to the case of a railroad mortgage foreclosure. He said in his opinion:—

"If the present case is covered by the decision of the Brine case, then the decree of July 18th, 1878, must stand, otherwise not. The fundamental question, therefore, is, whether the redemption laws of Indiana and Illinois, prescribing the time within which real estate or lands may be redeemed after sale, embrace an ordinary railroad corporation which covers the entire property, rights, and franchises of such railroad."

* * * * * * * * * *

"Now the court knows judicially that to attempt to apply those execution laws of Indiana, so far as related to the personal property of a railroad corporation, and to apply the redemption laws as to real estate to so much of its property as is real estate, and whereas the redemption clause was made in the interest and for the benefit of debtors, the result of such an application would be not simply to destroy the interest of the debtor, but to place the property in such a condition that it can not be redeemed as an entirety by the railroad company, to be operated for public purposes.

"I do not doubt, therefore, that it was never in the minds of the framers of the Indiana statute to embrace in the redemption clause, giving the right of redemption as to real estate, to the property of a railroad corporation where that property is sold under a mortgage, which does not cover simply the real estate, but covers all of its property, personal and real, including the franchises.

"And not only because the contract of the parties authorized the mortgage to be made in this way as an entirety, but public policy would induce a court to lean against any construction of the statutes of such State as would virtually destroy the value of these mortgaged securities

and destroy the interest of the railroad companies themselves, and, more than that, overturn the very purposes for which the railroad company was organized by the legislature."

And as to the Illinois law, the court say:—

"Now the same considerations that I have already adverted to as applicable to the existing law of Indiana would seem to lead to the same conclusions as to the statute here, that, as this line of railway in the State was put under mortgage by authority of its charter and the general law of the State, the mortgage covering all of its property, both real and personal, as an entirety, and, as it is to the interest of the debtor as well as of the public, that when the sale takes place it be sold as an entirety, and not a part of it sold for cash, and part of it sold with a right of redemption; not sell the Indiana part with a right of redemption to redeem in twelve months, and sell the Illinois part with a right of redemption extending three months after the twelve months in favor of the judgment creditor, but to construe the statute as not intended to embrace a mortgage of corporate property covering the personal property and real estate, including the franchise of the corporation; but that it was only intended to give the right of redemption from the sale of land or real estate owned by private individuals, ownership of which was not connected with any public purpose."

4. The remaining assignments of error may all be treated together as referring to what is the really vital element in the decree, viz., the direction to the trustee to purchase the mortgaged property as an entirety, under the power contained in the mortgage, for the benefit of all the bondholders, with a secondary provision for subordinate interests, and the confirmation of the sale made to the trustee accordingly.

The fourth assignment as to outside parties being compelled to pay in a certain amount in cash, which was not required of

the trustees bidding under the power, and the other matters embraced in the first, second, third, fifth, and sixth assignments to the original decree and the third and fourth assignments in second appeal, all amount to the same thing. They assail the general scheme of the decree. If it holds good these assignments amount to nothing.

If the trustee bids for all bondholders who are forced to come in *pro rata* to the new corporation, there is no occasion for it to bid more than enough for expenses, while of any competitor, who would have to virtually pay the whole amount of bonds, it is but reasonable to ask a large deposit.

What is more usual in any ordinary foreclosure than for the mortgagee, if a purchaser, to have a special return so as to avoid his money going into court, while a stranger must pay all in?

The sale as an entirety, found by the court, in the sixth paragraph, to be a necessity, rendered necessary the provision made in the eighth clause for the class of claims therein mentioned, and the principal of which, established by the orders of October 21st, 1875, have been made the subjects of special assignments of error which have been already considered.

The real question, therefore, comes to this, Is the provision made in the fifth clause of the decree a fair and conscionable compliance with the power contained in the mortgage, or is it so strained and distorted that it is to be treated and considered as a fraud on the power? It is one or the other. The court in its discretion, based on the facts deduced from master's report and the expression of the wishes of bondholders therein contained, found the facts to exist for the exercise of the power—and equally in its consideration and discretion fixed the manner for the exercise of the power thus to be put in action, and the terms and conditions of its general application, subject to the subsequent approval of the majority of bondholders, which has since been had, and the confirmation of the court, which has since been also given.

If the power is given, and if the exercise is within its terms or meaning and the discretion has been fairly exercised by the chancellor, advising and directing the trustee in carrying into effect the desires of the bondholders, who are the true donees of the power, then there is no ground for appeal, and the decree must be affirmed. A reversal must be on the ground that the attempted exercise of the power has departed so widely from the power as to be a fraud on it, by attempting to carry out under it a plan so different from its purpose as to be irreconcilable with it.

To arrive at a just conclusion on this point, the first thing to be considered is the object or intent of the power,—what the danger or mischief was which its insertion in the mortgage was intended to remedy or guard against. When we arrive at a comprehension of this, it seems to us to become apparent that it is the power itself which is the real object of hostility, and that the decree is attacked not because of its not carrying out the intent and object of that power, but just because it carries out that intent too faithfully.

No mischief has become more clearly apparent to the holders of bonds, constituting part of a large issue secured by a common mortgage, than the danger of sacrifice they run at a foreclosure sale, from the difficulty of combination between holders of relatively small amounts of bonds, to protect themselves at a sale, and the impossibility of protecting themselves at such a sale without a combination, owing to the amount of money compelled to be furnished being too large for the means of any ordinary bondholder. Thus it had become a crying evil that at such foreclosure sales too often the property was bought in by a combination of speculators, far below its value, and the interests of bondholders sacrificed.

A clause was inserted in the first mortgage, intended to guard against this evil, which will be found on page 38 of printed record, and is as follows:— * * *

"And it is further covenanted and agreed by and between the parties hereto, that in case of any judicial foreclosure sale or other sale of the premises embraced in this mortgage under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request the said trustee, or their successor, they are authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds secured by this mortgage.

"And having so purchased said premises, the right and title thereto shall vest in said trustee, and no bondholder shall have any claim to the premises, or to the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation to be formed for the use and benefit of the holders of the bonds secured hereby, and that said trustee may take such lawful measures as deemed best for the interest of said bondholders to organize a new company or corporation for the benefit of the holders of the bonds secured by this mortgage. Said new company or corporation shall be organized upon such terms, conditions, and limitations, and in such manner as the holders of a majority of said outstanding bonds secured by this mortgage shall in writing request or direct. And the said trustee so purchasing shall thereupon reconvey the premises so purchased by them to said new company or corporation."

The very intent and object of this clause is to guard against the competition which the appellants so much desire, and secure the common interests of all the bondholders against any faction, either of bondholders or outsiders. It prevents the necessity of any cash whatever being contributed by the bondholders, except, perhaps, for necessary expenses, by compelling all bondholders to come in under the purchase, and rendering it unnecessary to pro-

vide, in cash, for the proportion of non-assenting bondholders. The intent of the provision is so transparent in this respect, and its wisdom so clear in the light of experience, that the mere statement is enough to show the futility of all the objections of the appellants, except one, viz., that which we understand to be made by the first assignment of error as to the provision for subordinate interests in the decree. This we concede to be important enough to require separate treatment, but the other objections seem to us as virtually against any exercise of the power.

The very object of the power was to prevent a sale for cash, which was what the appellants demanded, and desired the trustees to appeal, unless it was conceded. (Page 1195 Record.) Equally did action under this power require the court to provide as it did for all specific liens which had a priority by making the purchase subject to such liens; this has been above demonstrated to be necessary, the sale being of the mortgaged premises as an entirety, and to give an opportunity for the exercise of the power they could not be sold otherwise. As to the request, the master's report and the decree of the court found a state of facts such as fully amounted to such a formal request, and the court's determination of the existence of this request, and desire of the majority of the bondholders has not been, and could not be made, the subject of exception. Then the state of facts to call into exercise the power being found to exist, why should not the power, its proposed exercise, and the direction and advice of the court to exercise it, be placed upon the decree? It is respectfully submitted that it would have been a just ground for complaint if this had not been done, and the whole scheme for purchase, &c., been left, without recognition in the decree, for outside action. Intending purchasers or a non-assenting minority of bondholders might have had ground for complaint, had the decree been made in the ordinary form, with no mention of a direction for the use

and exercise of this power. The allegation that the decree in this respect does not follow the pleadings seems to us trivial. The mortgage was appended to the bill, and equitable relief was prayed such as the trust deed or mortgage rendered proper. The master's report, as well as the several petitions, shows the wishes, desires, and requests expressed by the bondholders, so that the character of relief sought to be given by the decree did in every essential particular appear by the pleadings and the record.

It seems to us, therefore, that the only objection having even an appearance of plausibility is the one above referred to with regard to the recognition of subordinate interests. Now to answer this objection, it is necessary, first, to clearly state it, which is not done in any of the assignments of error. As we understand the objection made, it is that by the power given by the trust deed, the purchase must be not only in the words of the instrument, for "the use and benefit of the holders of the then outstanding bonds secured by this mortgage," but for their exclusive use and benefit, and that the subsequent clause, that the new corporation "shall be organized upon such terms, conditions, and limitations, and in such manner as the holders of a majority of such bonds shall request, &c.," is to be construed as limited by the previous clause construed in the exclusive manner above mentioned. So that the case, according to this theory, would be like that where a power is given, for instance, to appoint among children, and the donee of the power should undertake to appoint to a stranger.

Now it seems to us clear that this narrow and literal construction (that is, literal as to one part) is erroneous, and tends to defeat the very object and spirit of the power. The object of the power is apparent: it is to prevent the delay of long litigation between adverse interests, the danger of a sale for cash, and the delays of a right of redemption, if such a right should exist, by procuring a speedy sale, at

which the interests of all the bondholders should be protected, and a prompt re-organization in a new company, whereby the delays and expenses of appeals, receiverships, and redemption should be avoided. But if the privilege of uniting under the power in a common scheme is confined to one class of creditors only, the good sought to be accomplished is still far off, and only one class of dangers, that from factions among the first mortgage bondholders, obviated. A contest with second and third mortgage bondholders, floating creditors, and stockholders would still be impending, with all the delays and expense sought to be prevented. Further, there were three mortgages, in all of which the trustees were the same, and all containing a like clause as to purchase and re-organization by the trustee for bondholders. Are these to be construed as each imposing distinct and independent duties, and must the trustees, dividing themselves in three, look under each only for the benefit of the particular respective class of *cestuis qui trustent*, and can not they read the three trust deeds together as constituting part of a common scheme? Is not this emphatically a case where the construction should be "*ut res magis valeat quam pereat?*" Now turning to the words of the power, are not the subsequent words, "that the new company shall be organized upon such *terms, conditions*, and *limitations*, and in *such* a *manner* as the majority of first mortgage bondholders shall direct," intended to give just this liberty of including subordinate interests in the reorganization for the furtherance of the general aim. The purchase must be for the use and benefit of the first mortgage bondholders, but there are no exclusive words. And the majority are expressly empowered to fix the terms and manner of reorganization with the widest power that it would seem words can give. Are they then to be held prohibited from such a recognition of the subordinate interests in the reorganization as will be manifestly for their own advantage? The advantages to the first mortgage

bondholders of the admission to a qualified interest in the new corporation of the lower class of creditors, &c., are quite apparent. First, the question of the right of redemption, confessedly a difficult one, which it was thought necessary to guard by a formal provision in the decree, is readily got over, since the subordinate interests would in any case renounce and have in the present instance willingly relinquished, a right which, if they possess it, is more injurious to others than beneficial to themselves, in exchange for the interest given them under the purchase. This would assure to the purchasers a clear and indisputable title at least a year earlier than it could otherwise be secured. The dangers of a prolonged contest, ending with appeals by the subordinate interests, are also avoided by their inclusion; and the still greater benefit is obtained by such a re-organization as planned in the present case, that by still keeping a class below the first mortgage bondholder they impose upon the subordinate interests the task of maintaining and keeping up the road, &c., which otherwise would fall on themselves. And even if there was an erroneous exercise of discretion it could not be controlled by chancery if within the power, still less could it be the subject of appeal. It may further be remarked that in the scheme for re-organization presented to bondholders by these very appellants, general results, not unlike those provided for in the decree, are sought to be arrived at, although not under the power. Now let us look at the provisions as to the exercise of the power provided for in the fourth and following clauses of the decree. The court ascertained by the master's report the wishes of the bondholders (and their wish in this respect was confirmed by formal written requests to the trustees by a majority), and then proceeded to guide the exercise of the power in general terms, so that, first, the property should be purchased by the trustee at no expense beyond the necessary costs; second, that conveyance of the same

should be made to the trustee for the various trusts indicated; and, third, the re-organization in a new corporation, in such manner as the first mortgage bondholders, by a new action, should approve, in which these first mortgage bondholders should hold the controlling interest and power of management, and the later interests stock of a lower class without power of management. Now the first of these provisions, the sale and the purchase by the trustee, has been carried into effect under the order of the court; the conveyance and re-organization have been checked by the second appeal.

Now, so far as this order is in the discretion of the chancellor advising the conscience of the trustee in the execution of his trust and aiding in the execution of the power, it is clearly not appealable. The only ground for appeal must be if the chancellor has so misconstrued the instrument as to have ordered the trustee in the assumed execution of the power to perpetuate a fraud on it. Now, on principle, we think we have made it clear, that, so far from doing this, the court have, with a wise and liberal judgment, given a true construction to the whole trust, rightly interpreting the provision that the purchase is to be for the use and benefit of the first mortgage bondholders by the clause that the new company is to be organized on such terms and in such manner as the bondholders shall direct. In fact, the very words, "terms, conditions, and limitations" would seem to show the expected existence of more than one class of persons interested in the purchase. Why should limits and conditions be needed if there were but one class of stockholders to be considered, having exactly similar interests? If we turn to authority, while we concede this case to be in great measure one of the first impression, yet we think there are not wanting precedents which throw light on the principle by which the power and its exercise are to be construed.

First, let us see what this power is. It is a power created by convention of the parties, not by operation of law.

It is a power given to those interested, not a naked power,—a power appendant to the interest, one given to the *cestuis qui trustent*, not to the trustee, for the discretion is that of the bondholder, the trustee's act in the purchase is a duty rather than a power.

Now, for each of these reasons, is a greater liberality of construction to be given to the power.

Sugden on Powers, 46.

Under Mr. Sugden's classification this power is clearly a power appendant, to be exercised by the donee for his own benefit, which is another reason for a more liberal construction of it than if it were to be used for the benefit of another.

In Taylor *vs.* Benham, 5 Howard, 233, this court adopted the principle of construction that "in case of a power coupled with an interest, courts are inclined to hold its duration and quantity commensurate with the object to be accomplished."

In the case of Williams *vs.* Peyton, 4 Wheat., 77, the court drew the distinction that while in case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it; the rule as to powers coupled with an interest is more liberal. In such cases, as held in Piatt *vs.* McCullough, 1 McLean, 69; Bright *vs.* Boyd, 1 Story's C. C. R., 478, the court will aid a defective execution of a power.

But in all cases courts will lean in favor of the execution of a power when it can be supported.

Warner *vs.* Howel, 3 Wash., C. C. R., 12.

Segee *vs.* Thomas, 3 Blatchf., 11.

In Naglee's Estate, 52 Penna., 154, it was held, even as to a naked power, that a court will not control the judgment of trustees confirmed by a will as to the time for division of an estate, but their opinion conscientiously exercised was held to be the only test of propriety of the time for the division.

McFadden *vs.* Drake, 79 Penna., 473, was a case where a power was given, in the instrument creating the trust, to a trustee to sell and convey as the married woman, the beneficiary of the trust, should appoint. The married woman and her husband conveyed the property without the trustee joining in the deed. The conveyance was held a good execution of the power; the power given to the trustee being treated rather as a duty, while the power given to the married woman, being coupled with an interest, was the vital and substantial power. So we contend the power given here to the bondholders is the vital and real power, and the trustee's duty rather ministerial, to carry out the discretion exercised by a majority of the *cestuis qui trustent.*

In Williams' Appeal, 73 Penna., 285, the court, sustaining an opinion given by Judge Strong, held, "That a court of equity does not interfere with a discretion reposed, except in cases of clear abuse, when the court can conclude that the donee of the power is acting in fraud of it."

So Perry lays down (Perry on Trusts, page 457, section 511):—"If trustees exercise discretionary power in good faith and without fraud or collusion, the court can not review or control their discretion."

So Hill (Hill on Trustees, 482):—"Courts will not in general assume the exercise of discretionary powers vested in trustees or interfere to control the trustees acting *bona fide* in the exercise of their discretion."

So Lord Hardwick said, in Gower *vs.* Mainwaring, 2 Ves., 89:—"Whenever there is a trust or power, whether arising on the legal estate or reserved, to be exercised by the trustees, based according to their discretion, I do not know how the court can put themselves in the place of these trustees to exercise their discretion." Here the discretion has been exercised by the *cestuis qui trustent*, the power arising on their equitable ownership, and the chancellor has guided the trustee in carrying into effect the

power thus exercised. It would be unheard of for an appellate court to reverse this action and strike down the exercise of the power thus made.

And *vide*—

Buxton *vs.* Buxton, 1 M. & C., 80.

Pulpress *vs.* The African Church, 48 Penna., 204–210, is another strong case in support of our view. There was a bequest for distribution of funds among the colored churches of Pittsburg. The court refused to interfere with a discretionary exercise of the power giving all the funds to one church.

A further distinction must be borne in mind as to the reasons for which the exercise of a power may be held fraudulent and therefore void, that is the distinction between appointments void at law and void in equity. (Sugden on Powers, 606.) The exercise of this power, if bad, must be because void at law from a discrepancy on the face of the appointment. It is not fraudulent in equity, for there is no concealment, or private bargain, or fraud in fact, or corrupt motive in the exercise of the power pretended or alleged. The doctrine of illusive appointments, which are *quasi* fraudulent in equity, seems never to have prevailed in this country, and even that virtually exploded doctrine can not have any application to the present case.

The exercise of the power is either good and valid, or it is bad, because, deliberately, in good faith, in a full exercise of discretion, and openly on the face of the record, the majority of the *cestuis qui trustent*, the trustees, and the chancellor have concurred in making a small subordinate provision for the later interests, which provision it was clearly for the interest of the first mortgage bondholders to concede, and which was granted for that reason.

R. L. ASHHURST,
J. C. BULLITT,

Of Counsel for Alexander et al., *bondholders, original Complainants; for the combined Committees of First and Second Mortgage Bondholders, and for the Railway Company Defendant.*

In further support of the argument in our brief as to the liberal construction to be given to such powers and their exercise, we would also refer to the case recently decided by this court of Markey *vs.* Langley, 2 Otto, 142. This court there expressed widely different ideas of the duties of a trustee for sale, &c., under a mortgage, from those urged on the part of the appellant.

They say (page 155), "A mortgagee under such circumstances is a trustee for the benefit of all concerned. He must regard the interests of others as well as his own. He should seek to promote the common welfare; if he does this, and keeps within the scope of his authority, a court of equity will not hold him responsible for errors of judgment, if they have occurred."

And on page 154, "When a power coupled with a discretion has been exercised, a court of equity, in the absence of fraud, rarely interferes. In this case the mortgagees were authorized to sell for cash or credit. This gives them authority to do either or to combine them."

And cite with approval the opinion in the case of Mahone *vs.* Williams, 39 Ala., N. S., 202. "The question is not so much whether there has been a literal and technical, or a fair and reasonable compliance with the terms of sale, and a *bona fide* disposition of the property. His duty as a trustee (under a mortgage) required an advantageous sale of the property for the benefit of all the parties interested."

We would also refer to the case of Ketcham *vs.* Duncan, 6 Otto, 659, with regard to the propriety of a decree making special provisions for purchase on behalf of the bondholders, and to carry out a scheme of re-organization. In that case the decree below referred to the bondholders' and creditors' agreement, called the agreement of re-organization, and made special provision as to the rights of those coming in under such agreement with regard to the purchase. (See page 673.) It is true that on page 672 the court expresses some question as to whether there would have been a right in that case to decree a strict foreclosure, which the appellants then seem to have desired, or to make an order for the trustee to purchase for the benefit of all the lien creditors, but in that case there seems to have been no such power as in the case now before the court.

